of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

*It is further ordered,* That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

*It is further ordered,* That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

*It is further ordered,* That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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## IN THE MATTER OF

## UNITED FRUIT COMPANY, ET AL.*

### ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE CLAYTON ACT, SECS. 2(a), 2(f), AND 7

*Docket 8795. Complaint, July 28, 1969—Decision, Jan. 12, 1973.***

Order requiring the largest banana jobber in the United States, located in Long Beach, California, to sell its major competitor in the Los Angeles area which it acquired in 1968; to stop knowingly inducing discriminatory prices; and to not make any acquisition of any banana firm for the next ten years without prior Federal Trade Commission approval.

Order requiring the largest importer of bananas in the Los Angeles market, and its subsidiary, to stop discriminating in price among purchasers of their bananas.

*During the course of this proceeding, United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

**Respondent Harbor Banana Distributors, Inc., filed a separate petition for review on March 20, 1973 in the Court of Appeals for the Fifth Circuit. On March 22, 1973, respondents United Brands Company and Chiquita Brands, Inc. also filed a petition for review in the same court.

## COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Section 45) and the Clayton Act, as amended (15 U.S.C. Sections 13, 18 and 21), by virtue of the authority vested in it by said Acts, having reason to believe that United Fruit Company, United Fruit Sales Corporation, and Harbor Banana Distributors, Inc., all corporations, hereinafter more particularly described and referred to as respondents, and hereby made respondents, have violated and are now violating the provisions of Section 2 of the Clayton Act, as amended, as hereinafter more particularly described, and having reason to believe that the respondents United Fruit Company, United Fruit Sales Corporation, and Harbor Banana Distributors, Inc., have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act as hereinafter more particularly described, and having reason to believe that the respondent Harbor Banana Distributors, Inc., has violated the provision of Section 7 of the Clayton Act, as amended, as hereinafter more particularly described, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its charges in respect thereto as follows:

PARAGRAPH 1. Respondent United Fruit Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal business office located at Prudential Center, Boston, Massachusetts. Respondent United Fruit Company is now, and for many years past has been engaged in the business of growing, causing to be grown, acquiring, processing, shipping, distributing and selling a variety of tropical agricultural food products including bananas. United Fruit Company operates many branch offices, installations and port facilities throughout the world and the United States. In 1966 its sales of all products and services were approximately $440 million, and its sales of bananas in that year were approximately $287 million. United is the dominant importer and distributor of bananas in the United States and the Los Angeles, California area. In 1966 United imported and distributed more than fifty percent of all bananas sold in the United States and more than sixty-five percent of all bananas sold in the Los Angeles, California area.

Some of the bananas sold and distributed by respondent United are sold for use, consumption and resale within the United States.

PAR. 2. Respondent United Fruit Sales Corporation, is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal business office located at Prudential Center, Boston, Massachusetts. Respondent United Fruit Sales Corporation, is now and, at all times referred to herein, has been a wholly-owned subsidiary of respondent United Fruit Company, and serves as the sales agent in the United States of United Fruit Company. Respondent United Fruit Company and respondent United Fruit Sales Corporation, are hereinafter jointly referred to as "United."

PAR. 3. Respondent United, in the course and conduct of its business, ships, and for many years past has shipped, bananas from foreign nations to purchasers located in many States of the United States. At all times referred to herein respondent has maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 4. Respondent Harbor Banana Distributors, Inc., was incorporated under the laws of the State of California on December 18, 1964, and exists and conducts its business under the laws of said state with its principal business office located at 1420 Panorama Drive, Long Beach, California.

Upon its incorporation, respondent Harbor Banana Distributors, Inc., succeeded in interest, privity, control and purpose the business of a joint venture organized under the laws of the State of California on May 26, 1964 by Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., California corporations. Said joint venture operated under the fictitious firm name "Harbor Banana Distributors, Inc.," and succeeded in interest, privity, control and purpose the businesses of the said Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc.

Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., during the times referred to herein and for many years past were operated, controlled and substantially owned by Norf James Jebbia and Dominic Jebbia, individuals, and other individuals who are members of their mutual family, all of which individuals are sometimes hereinafter referred to as the "Jebbia Family." In addition to, and sometimes in connection with, Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., the Jebbia Family for many years past operated

their business, as hereinafter described, under a variety of firms and trading names including San Fernando Valley Distributors, Inc., Colton Banana Distributors, West Coast Banana Distributors, and Union Banana Distributors.

Respondent Harbor Banana Distributors, Inc., and the individuals and firms described above as its predecessors are jointly referred to herein as "Harbor." Harbor is now and for many years past has been engaged in the business of purchasing bananas from importers, processing bananas and selling and distributing bananas to retailers and wholesalers in the Los Angeles, California area. Respondent Harbor had sales of approximately $5.5 million in 1967.

The bananas purchased, processed, sold and distributed by respondent Harbor are sold for use, consumption, and resale within the United States.

At all times referred to herein respondent Harbor has competed with other corporations and with individuals and firms in the sale and distribution of bananas.

PAR. 5. Respondent Harbor, in the course and conduct of its business of purchasing and selling bananas, has purchased bananas from importers from foreign nations, causing bananas to be shipped from foreign nations to its place of business in the State of California and causes and has caused bananas to be shipped from the State of California to purchasers located in various other States of the United States. At all times referred to herein, respondent Harbor has maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

COUNT I

Alleging violation of Section 2(a) of the Clayton Act, as amended, by respondent United.

PAR. 6. The allegations of Paragraphs One through Five, are alleged in Count I the same as if fully written herein.

PAR. 7. In the course and conduct of its business in commerce, repondent United now discriminates and since July 1965 has discriminated, in price in the sale of bananas of like grade and quality in the Los Angeles, California area by selling bananas to respondent Harbor upon terms and conditions significantly more favorable than the terms and conditions respondent United sells

bananas of like grade and quality to other purchasers competing with the favored purchaser, Harbor.

For example, respondent United now maintains and for many years past has maintained a terminal facility at Wilmington, California located at the waterfront on San Pedro Bay. During the times referred to herein, respondent United has sent two ships each week loaded with bananas to its terminal facility at Wilmington, California where respondent United unloads bananas from its ships into trucks and railroad cars for its various purchasers, which purchasers then transport said bananas to their respective processing warehouses, at their own expense.

Beginning in July 1965 and once each week since that date, respondent United has sent its ship loaded with bananas directly to the processing warehouse of the favored purchaser, respondent Harbor, at Long Beach, California, located at the waterfront on San Pedro Bay, where respondent United unloads the bananas sold to respondent Harbor directly into Harbor's processing warehouse.

Since July 1965 respondent United has maintained and does maintain a tract of land and necessary equipment and facilities at Long Beach, California for the sole purpose of unloading bananas from its ships into respondent Harbor's processing warehouse and has employed such land, equipment and facilities for this purpose.

Many of the purchasers of bananas from respondent United who receive their bananas from said respondent at its Wilmington, California terminal compete with the favored purchaser, respondent Harbor, in the distribution and resale of bananas in the Los Angeles area. None of the nonfavored competing purchasers receive the delivery and warehouse loading service and favorable terms and conditions of sale afforded to respondent Harbor, with the result that they incur substantially higher transportation expenses than the favored purchaser, respondent Harbor, in connection with the purchase of bananas from respondent United.

Said difference in delivery and loading service has resulted in a substantial discrimination in the ultimate or net price for products sold to its favored and nonfavored purchasers by respondent United.

PAR. 8. The effect of respondent United's discrimination in net price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which its

favored purchaser is engaged, or to injure destroy or prevent competition between the favored and nonfavored purchasers or with customers of either of them.

PAR. 9. The aforesaid acts and practices of respondent United constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Alleging violation of Section 2(f) of the Clayton Act, as amended, by respondent Harbor.

PAR. 10. The allegations of Paragraphs One through Nine are alleged in Count II the same as if fully written herein.

PAR. 11. Prior to the beginning of the discriminatorily favorable delivery and loading service, terms and conditions of sale, and net prices afforded to respondent Harbor as alleged in Count I above, respondent Harbor, in the course and conduct of its business in commerce, induced respondent United to agree to afford it such discriminatory considerations, when respondent Harbor knew or should have known that such discriminatory benefits would not be granted to all of the other purchasers from respondent United competing in the distribution and resale of bananas with respondent Harbor.

From the commencement of the discriminatory delivery and loading service, terms and conditions of sale, and net prices as alleged in Count I above to the present, respondent Harbor in the course and conduct of its business in commerce, has induced, induced and received, and received such discriminatory considerations when it knew or should have known that such discriminatory considerations were not granted to all of the other purchasers of bananas of like grade and quality from United competing in the distribution and resale of such bananas with respondent Harbor.

PAR. 12. The aforesaid acts and practices of respondent Harbor constitute violations of subsection (f) of Section 2 of the Clayton Act, as amended.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act by respondents, Harbor and United.

PAR. 13. The allegations of Paragraphs One through Five and

Paragraphs Seven, Eleven and Eighteen through Twenty-Two are alleged in Count III the same as if fully written herein.

PAR. 14. In the course and conduct of its business in commerce, respondent Harbor has attempted and is attempting to monopolize the sale and distribution of bananas in the Los Angeles area by various acts and practices, including but not limited to the following:

A. Selling or offering to sell bananas at unreasonably low prices approaching or below the cost of purchasing, handling, processing and distribution.

B. Acquiring and developing the physical facilities and capacity to support a monopoly in the sales and distribution of bananas in said market. For example, in July 1965, respondent Harbor completed the construction of and began operating a banana processing warehouse on the waterfront of San Pedro Bay at Long Beach, California. Said warehouse is especially and uniquely designed and equipped for the handling and processing of bananas. Said processing warehouse has the capacity to handle, process and store, in anticipation of sale, enough bananas to satisfy the entire needs of the Los Angeles market area presently and in the foreseeable future, and exceeds the total capacity of Harbor's own prior capacity and all its competitors combined.

C. Inducing, inducing and receiving, and receiving the discriminatory terms and conditions of sale as alleged in Count II herein.

D. Acquiring the business and assets of its largest competitor as alleged in Count IV hereinafter.

PAR. 15. Each of the acts and practices of respondent Harbor alleged in this count separately and in combination with each, any, or all of the other acts and practices alleged in this count have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; have been conducted, engaged in, and adopted, for the purpose of creating monopoly in respondent Harbor; are all to the prejudice of the public and to competitors of respondent Harbor; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 16. In the course and conduct of its business in commerce, respondent United, by discriminating in the terms and conditions

of sale as alleged hereinbefore, has knowingly and materially aided and abetted, and is knowingly and materially aiding and abetting respondent Harbor in the acts and practices alleged in this count, and in Harbor's attempt to monopolize the sale and distribution of bananas in the Los Angeles area.

United's aiding and abetting of respondent Harbor together with any or all of the acts and practices of respondent Harbor as hereinbefore alleged have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; and are all to the prejudice of the public and to competitors of respondent Harbor. Said aiding and abetting by respondent United constitutes unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## COUNT IV

Alleging violations of Section 7 of the Clayton Act, as amended, by respondent Harbor in respect to the acquisition of the assets of Charles C. McCann Company, Inc., and Tradewinds Produce, Inc.

PAR. 17. The allegations of Paragraphs Four, Five, and Fourteen are alleged in Count IV the same as if fully written herein.

PAR. 18. The Charles C. McCann Company, Inc., was organized in 1957 and at all times pertinent hereto was a corporation, organized and existing under the laws of the State of California. Tradewinds Produce, Inc., was organized in 1962 and at all times pertinent hereto was a corporation, organized and existing under the laws of of the State of California, and traded under the name "W. W. Crenshaw Company." During the period of their mutual existence, the Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., shared common ownership, management, and facilities and had the same principal business offices at 780 Warehouse Street, Los Angeles, California. Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., were operated as a single business enterprise engaged in the wholesale distribution of bananas. They were collectively known in the trade as, and are sometimes referred to herein as, "McCann-Crenshaw."

PAR. 19. During 1966 and for at least several years prior thereto, McCann-Crenshaw was a growing and increasingly profit-

able business with substantial sales and profits. For example, in 1966, McCann-Crenshaw had sales of about $3.5 million with net profits exceeding $90 thousand. Prior to its acquisition by respondent Harbor, McCann-Crenshaw competed with respondent Harbor in the purchase, sale, and distribution of bananas in the Los Angeles, California area.

PAR. 20. The wholesale distribution of bananas in the Los Angeles, California area is a substantial business with sales of about $13.5 million in 1967. Concentration is high and is increasing. In 1967 the two leading wholesale banana distributors in the market accounted for about sixty-five percent of wholesale banana sales. Respondent Harbor ranked first with about forty percent and McCann-Crenshaw was second with about twenty-five percent of such sales. Following the combination of the businesses of respondent Harbor and McCann-Crenshaw, the two-firm concentration in that market increased to about 77 percent.

PAR. 21. In February 1968, respondent Harbor acquired the assets of McCann-Crenshaw as a going business, by execution of the terms of a sales agreement dated February 2, 1968, wherein the Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., collectively agreed to sell their tangible personal property and interest in leases to respondent Harbor.

PAR. 22. At the time of said acquisition and at all times relevant hereto, Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., separately and jointly have purchased bananas from importers from foreign nations, causing said bananas to be shipped from foreign nations to the State of California and have caused said bananas to be shipped from the State of California to various other States in the United States. At all times referred to herein Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., have maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Clayton Act.

PAR. 23. The effect of the acquisition of the McCann-Crenshaw business and assets by respondent Harbor as herein alleged, may be substantially to lessen competition or tend to create a monopoly in the wholesale distribution of bananas in the Los Angeles, California area, in violation of Section 7 of the Clayton Act (15 U.S.C. Section 18) as amended.

*Mr. Ivan W. Smith* and *Mr. David M. Malone* supporting the complaint.

*Mr. Harry L. Shniderman, Mr. Michael J. Henke,* and *Mr. Rodney E. Gould, Covington & Burling,* Washington, D.C., *Mr. Henry C. Thumann, Mr. George A. Manfredi, O'Melveny & Myers,* Los Angeles, California, for respondents United Fruit Company and United Fruit Sales Corp., *Mr. Eberhard P. Deutsch, Mr. Bernard Marcus,* and *Mr. Joseph H. Lawson, Deutsch, Kerrigan & Stiles,* New Orleans, Louisiana, for respondent Harbor Banana Distributors, Inc.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

NOVEMBER 18, 1971

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## I

## PRELIMINARY STATEMENT

This proceeding was commenced on August 1, 1969, by the service of the complaint of the Federal Trade Commission on respondents. Respondents are: United Fruit Company, the largest importer of bananas into the United States and its subsidiary, United Fruit Sales Corporation by whom its selling activity was conducted (both described as United) and; Harbor Banana Distributors, Inc. (Harbor) the largest banana jobber in the United States that carries on its operations in the Los Angeles-Long Beach, California area.[1]

### A. The Pleadings

The complaint contains four counts and certain descriptive matter concerning the business (reiterated in each count). The

[1] During the course of this proceeding United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

first count charges that United discriminated in net price in favor of Harbor in violation of Section 2(a) [2] of the Clayton Act, as amended, Count II that Harbor induced the discrimination in violation of Section 2(f) [3] of the Clayton Act, as amended; Count III that Harbor had attempted to monopolize the sale and distribution of bananas in the Los Angeles area, aided and abetted by United in violation of Section 5 [4] of the Federal Trade Commission Act; and, Count IV that Harbor had purchased the assets of competitors, Charles C. McCann Company (McCann) and Tradewinds Produce, Inc. (Tradewinds) in violation of amended Section 7 of the Clayton Act.[5]

On August 14, 1969, respondent Harbor moved for a more definite statement. The motion was denied August 21, 1969, and a prehearing conference was scheduled for 3 days after the date fixed in the complaint for the initial hearing.

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[2] Section 2(a) as amended, reads in pertinent part as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (15 U.S.C.A., sec. 13, as amended)

[3] Section 2(f) of the Clayton Act, as amended, reads as follows:

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (15 U.S.C.A., sec. 13, as amended)

[4] Section 5(a)(1), as amended, of the Federal Trade Commission Act reads as follows:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." (15 U.S.C.A. sec. 45)

[5] Section 7 of the Clayton Act, as amended, reads in pertinent part as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C.A. sec. 18)

Respondents filed their answers September 2, 1969. Each respondent (United being treated as one) admitted its corporate status and admitted some of the allegations regarding its activity, but generally there was denial of knowledge of the activity of the other respondent.

Respondent United took the position in its answer that it was under no obligation to answer regarding Counts II and IV. It stated that it had maintained a tract of land and necessary equipment at Long Beach and had discharged bananas there once each week during the period July 1965 to March 4, 1969. It also stated that it had maintained a terminal facility at Wilmington, California, and had sent two ships there each week loaded with bananas.

As an affirmative defense to Counts I and III, United alleged that the counts failed to state a cause of action and that United's action in discharging at Long Beach was taken in good faith to meet an equally low price or equal the services of a competitor.[6]

Respondent Harbor first separately stated its affirmative defenses to Counts II, III and IV.

Its position was that the deliveries to Long Beach were nondiscriminatory; ceased prior to the issuance of the complaint; could have been made to others; were made to a disadvantageously located processing warehouse; and were made in good faith to meet competition.

Harbor's position as to Count III was that: (1) it was not engaged in interstate commerce; (2) no sales were made at unreasonably low prices; (3) it acquired no property unlawfully and its warehouse capacity did not exceed its needs; (4) it had not received or induced discriminatory terms; and (5) it had not unlawfully acquired any business.

Harbor's third defense relating to Count IV was that: (1) it acquired only the physical assets of a seller, no longer a competitive factor, that was unable to dispose of them elsewhere; (2) the seller retained other assets and its right to compete; and (3) the acquisition had no anticompetitive or monopolistic effect.

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[6] This defense and Harbor's similar defense were made pursuant to Section 2(b) of the Clayton Act, as amended, which reads in pertinent part as follows:

"* * * Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (15 U.S.C.A. 13(b))

Harbor's fourth defense was a paragraph by paragraph answer to each paragraph of the complaint.[7] Except for admissions regarding its corporate status [8] and that of United's, the unloading of bananas into its processing warehouse, the purchase of certain assets of Charles C. McCann Company and Tradewinds Produce, Inc., and their competition prior to 1966, the answer generally denied the remaining allegations of the complaint. We pass now to the prehearing procedures.

## B. Prehearing Procedures

Closed prehearing conferences were held in Washington, D.C., on September 19, 1969, December 2, 1969, March 4, 1970 and February 8, 1971 (Ph. Tr. 1–457) in an effort to simplify the proof and to insure complete discovery. The effort was partially successful in that most documents had been agreed to as genuine and the mathematical accuracy of most charts was conceded. Names of witnesses were also disclosed. A considerable period of time was expended in the preparation and exchange of charts and tabulations. This was due, in part, to differences of opinion concerning the geographic market and the competition to be included. And, despite the length of the hearings, considerable time was conserved by the prehearing procedures and by later agreements made during trial, for which counsel for all parties are commended. There were a number of other procedural matters disposed of during prehearings.

During the course of the prehearing procedures, counsel for Harbor reached an agreement with counsel supporting the complaint to submit to the Commission a proposed consent decree.

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[7] The following abbreviations will sometimes be used:

Tr.—Transcript page
Ph. Tr.—Prehearing transcript page
CX—Commission's Exhibit
RHX—Respondent Harbor Exhibits
URX—Respondent United Exhibits
RU—Respondent United
RH—Respondent Harbor
C.—Complaint
A.—Answer
RUPF—Respondent United's Proposed Findings
RHPF—Respondent Harbor's Proposed Findings
CPF—Complaint Counsel's Proposed Findings

(It should be noted, parenthetically, that exhibit numbers do not run consecutively throughout because among other matters charts were separately numbered during prehearing and it was necessary to set up a special series of hundreds for them. In addition, complaint counsel keyed their exhibits to sections of their proof.)

[8] In its answer respondent Harbor admitted that it was a successor to the Jebbia interests (hereinafter described as Jebbias and Jebbia family). In its findings it takes a different position (RHPF p. 150, *et seq.*), although no motion to amend was made.

Counsel for United refused to join but separately moved to dismiss. The hearing examiner certified both motions to the Commission on April 22, 1970, and April 24, 1970, respectively, and on May 13, 1970, issued an order rescheduling the hearing until after the decision by the Commission on the certifications. After receiving comments from the Division of Mergers on June 22, 1970, the Commission granted to the parties an opportunity to comment on the views of that division on July 7, 1970. Respondent Harbor replied on July 15, 1970, and the Commission on November 13, 1970, denied the motions of both of respondents. A motion for reconsideration was certified to the Commission on December 1, 1970. Reconsideration was denied January 15, 1971. A final prehearing conference was held Feb. 8, 1971, at which the times and places for the hearings were agreed upon. On the same day, respondent Harbor made a motion for partial summary judgment. This was denied March 8, 1971. Permission to appeal was also denied April 1, 1971. In the meantime, subpoenas *duces tecum* were issued and motions to quash were denied. We now consider the hearings.

C. The Hearings

Hearings commenced April 12, 1971, at Washington, D.C. and continued there until April 27, 1971. There was then a brief recess, stipulated by all parties to be necessary and hearings reconvened on May 10, 1971, in Los Angeles, California, by consent. Hearings continued there until May 27, 1971. After another short recess, stipulated as necessary by the parties, hearings resumed in Washington, D.C. and continued until July 2, 1971, at which time the evidence was closed. Twenty four witnesses testified and more than two thousand exhibit pages were considered.

The Commission extended the time for filing this initial decision until December 1, 1971, after conclusion of the hearings.

A novel procedure was adopted during the presentation of the case for Harbor. Two experts, one an economist and the other an accountant, were called by Harbor. Each identified a printed report compiled by him and stated that he had prepared it for submission in this case. Over complaint counsel's objection, the hearing examiner, after insuring that an adequate opportunity was given to complaint counsel to examine the reports, received

the reports in evidence in the nature of economic and accounting briefs but with the reservations that such briefs would not be taken for the truth of any facts not otherwise in evidence. The hearing examiner regards this innovation appropriate provided there is ample opportunity for preparation for cross-examination and provided that the facts forming the basis for the expert opinions expressed are otherwise established. Some saving of time resulted. The reports cannot, of course, be considered apart from the direct and cross-examination of the witnesses as such examination substantially affected the weight to be given to the reports. With these reservations it was considered helpful to an understanding of the position of the parties to have the reports received. We turn now to the basis of this decision.

### D. Basis of Decision

This decision is based on the evidence as a whole. Under the requirement of Rule 3.51(b) principal supporting items of evidence have been cited.[9] However, this does not mean that the impact of the record in its entirety has not been considered or that there are not additional references which might be cited. In deciding on the weight to be given the evidence, the hearing examiner has considered particularly the demeanor of the witnesses and the contemporaneous records maintained. Consideration has been given to the proposed findings and conclusions of the parties. Those not adopted in terms or in substance are rejected as erroneous, irrelevant, or immaterial. On these bases the following findings of fact, reasons for decision, conclusions, and order are made.

## II

## FINDINGS OF FACT

For convenience [10] findings of fact will be grouped under headings and subheadings listed in the table of contents. We consider first the respondents.

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[9] In citing references the hearing examiner has depended in large part on the voluminous and carefully prepared findings supplied by counsel. In citing the proposed findings reference is intended to be made to the citations there given.

[10] It is not intended or possible to insure, without undue repetition, that the material collected under each heading or subheading will include all data suggested by the title used. Accordingly, facts stated under one heading must be considered in connection with those stated under other headings.

A. The Respondents

1. At the time of the filing of the complaint herein, respondent United Fruit Company was a New Jersey corporation with its principal business offices located in Boston, Massachusetts (C., Par. 1; United's A., Par. 1). In 1969, the United Fruit Company was acquired by AMK Corporation, and the latter company was merged into the former company. Following the merger the activity of the former United Fruit Company was continued by an unincorporated division of the surviving corporate entity, and the corporate name was changed to United Brands Company (Tr. 998–999). The United Fruit Company Division of United Brands Company, and its predecessor, United Fruit Company, have engaged in and continue to engage primarily in the business of growing bananas in the tropics and transporting them in an unripened condition to worldwide markets including United States markets (Tr. 1001; 1113; RUPF I–1; CPF. 0.1, 0.2, 0.5).

2. At the time of the filing of the complaint herein, respondent United Fruit Sales Corporation was a Delaware corporation and a wholly-owned subsidiary of the United Fruit Company (C., Par. 2; United's A., Par. 2). The principal offices of United Fruit Sales Corporation were located in Boston, Massachusetts (C., Par. 2; United's A., Par. 2). United Fruit Sales Corporation's name was subsequently changed to Chiquita Brands, Inc. (Tr. 1000). Chiquita Brands, Inc., under both its present and previous corporate names has served and continues to serve as the sales agent for the United Fruit Company and, more recently, the United Fruit Company Division of United Brands Company [11] (Tr. 999; C., Par. 2; United's A., Par. 2; RUPF 1–2; CPF. 0.3).

3. United's worldwide sale of all products and services has ranged from about $333 million in 1964 (CX 175) to about $520 million in 1970. Total United Brands Company sales of all products for 1970 were about $1.4 billion (Tr. 1042). United's worldwide sales of bananas were $287 million in 1966, $312 million in 1967, and $322 million in 1968 (CX 178, 179, 181). United does not maintain separate figures for dollar sales of bananas in the United States. In 1969, United produced 101,750,000 forty-pound boxes of bananas (Tr. 1051), about 50 percent of which were

[11] United Fruit Company, the United Fruit Company Division of United Brands Company, United Fruit Sales Corporation, and Chiquita Brands, Inc., are sometimes hereinafter collectively referred to as "United," as they were loosely called United and United Fruit during the hearings (see CPF. 0.4).

imported into North America (Tr. 1051–1052). United imported about 56,455,000 boxes of bananas into North America in 1968 (CX 181). About 80 percent to 90 percent of United's bananas delivered to North America during the past several years have been their premium quality "Chiquita" brand product (Tr. 1051; CX 179, 181). During the ten years immediately past, United's share of the United States banana market has fluctuated from a low of 37 percent to a high of 55 percent (Tr. 1058; CPF. 0.5).

4. During all times relevant to this proceeding, United has maintained a substantial course of trade in bananas in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act (United's A.; CX 175–181; Tr. 1091–1092; CPF. 0.6).

5. Respondent Harbor Banana Distributors, Inc., was incorporated as a California corporation on December 18, 1964 (C., Par. 4; Harbor's A., Par. 4). Its principal place of business is in Long Beach, California (C., Par. 4; Harbor's A., Par. 4). Harbor is the successor to a banana wholesaling business theretofore owned and operated by the Dominick Jebbia family (C., Par. 4; Harbor's A.,[12] Par. 4). Harbor commenced operation in late July 1965 and since that time has continuously been engaged in the business of purchasing bananas from importers, processing the bananas, and reselling them at wholesale (C., Par. 4; Harbor's A., Par. 4; Tr. 1878; see RUPF 1–3; CPF. 0.7).

6. Respondent Harbor purchases, through advance orders based on anticipated needs of its regular customers, bananas which are cultivated and harvested in foreign countries located in the tropics and then imported into the United States (Admitted, Harbor A., CX 170, 171; Tr. 1063, 1104, 1110, 1111, 4491). Harbor sells such bananas to customers some of which are located outside the State of California (CX 225–232, 235–240; Tr. 1722–1725). The stockholders and most of the officers of Harbor are located outside the State of California and in New Orleans, Louisiana. There is of necessity substantial and regular communication between the general manager in California and its officials in Louisiana and regular transfer of funds and reports in the course of operation of Harbor (Tr. 1951–1953).

[12] In Harbor's proposed findings commencing at p. 150, that respondent seeks to avoid its admission that it succeeded to this business. Its recitation of the corporate history RHPF. 4.1–4.25, and the testimony of Dr. D'Antoni (Tr. 5217–5324) make it very clear that Harbor was, and was properly regarded by the trade as, successor to the business previously run by the Dominick Jebbia family (see also CPF. 0.8–0.12).

Harbor is thus engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and Clayton Act.

7. Respondent Harbor is now, and at all times relevant to this proceeding has been, engaged in the purchasing, ripening, selling, and distributing of bananas at wholesale in the Los Angeles, California, area. After ripening green bananas, Harbor sells them to retail grocers and general line produce wholesalers (Harbor A.; CX 233a, 220; Tr. 1700–1703). After 1968, Harbor began selling pineapples in quantity (Tr. 1721), but prior thereto the sale of pineapples constituted a very small part of Harbor's business (Tr. 1901). Harbor's total sales in 1966 were approximately $4.6 million. In 1968, Harbor's sales were approximately $9.4 million of which some $9.1 million of sales were banana sales and some $266,000 pineapple sales. In 1969, Harbor sold approximately $8.4 million worth of bananas and approximately $457,000 worth of pineapples (Attachment B, RHX 109; CPF. 0.14).

B. Other Importers

8. Standard Fruit and Steamship Company (Standard) is a corporation with principal business offices located in New Orleans, Louisiana (URX 49). It is a major importer of unripened bananas into the southern California market (URX 55). Standard entered the market in 1960, importing bananas grown principally in Ecuador (Tr. 1689–1690, 2266, 1040, 4491). By the end of 1964, Standard was supplying approximately 36 percent of the market area's banana requirements (Tr. 2264; URX 55n, o, s, t). At the time of the formal hearing, Standard supplied approximately 50 percent of the area's needs (Tr. 2406, 4566; RUPF I–4).

9. Driscoll Strawberry Associates (Driscoll) is a corporation with principal business offices located in Watsonville, California. It entered the business of importing unripened, Nicaraguan bananas into the southern California market in 1967 and continued such importations until late 1969 (URX 55h–k; Tr. 5898–5900; RUPF I–5).

C. The Banana and Its Distribution

10. A banana is the fruit of a tropical plant of the musaceae family of which there are a large number of varieties. Prior to

1960 most of the bananas imported into the United States were of the Gros Michel variety. In the 1960's, because of the susceptibility of the Gros Michel to Panama disease, the Valery or Cavendish banana replaced the Gros Michel (Tr. 1206; RHPF 2.9–2.10). This change of variety required changes in shipment and in ripening techniques (RHPF 2.10–2.11; Tr. 1207). These were in the process of change immediately preceding and during the period with which this proceeding is concerned.

11. Nearly all of the bananas consumed in the United States are produced in tropical regions of the Western Hemisphere and sales of bananas represent about 1 percent of all food sales in the United States (Tr. 1267–1268).

12. The principal importers of bananas into the United States are the respondent United and its chief competitor, Standard Fruit and Steamship Company. United customarily produces bananas either by itself, growing them on its own farms, or by making specific contracts with associated producers. United's bananas are grown in Costa Rica, Panama, Colombia, Honduras, Santo Domingo, Guatemala, Dominican Republic, Ecuador and Nicaragua. Standard Fruit and Steamship Company customarily has used Ecuador as the source of its bananas although Costa Rica has provided some of its fruit (see Tr. 1040; RHPF 2.6; CPF. 0.15; CX 175–180; Tr. 1013–1021).

13. Both United and Standard maintain their own fleets of refrigerated ships (some are chartered others are company owned) for transporting the bananas to the markets. After harvesting, United's bananas are now boxed and shipped to one of seven major United States port terminals for delivery to United's customers (CX 177, pp. 1–4). This proceeding is concerned principally with the ports of Los Angeles, California—Wilmington and Long Beach.

14. The bananas imported into Los Angeles are harvested while still green (Tr. 1113). During the period of time relevant to this proceeding, the green fruit was first transported to California on stems and during a later period taken to boxing stations in the tropics where the stems were cut into hands and packed in 40-pound boxes for transportation to California (Tr. 1028–1030, 1442). The change from shipping on stems to shipping in boxes into California took place between 1963 and 1964 largely as a consequence of the change from Gros Michel to

Cavendish variety bananas. This was because the Cavendish or Valery banana was more fragile and had to be protected against bruising (Tr. 4518–4519). The fruit was shipped under carefully controlled temperature and humidity conditions in the importers refrigerated ships (Tr. 1085).

15. The importers do not ripen bananas. Sales to their customers are usually f.o.b. alongside ship (at the waterfront). United also maintains inland sales offices with which this proceeding is not concerned. Both importers have developed trade names for their bananas and participate to some extent in consumer advertising (Tr. 1396; CX 514a–b; Tr. 4495, 4497).

16. Both United and Standard sell to three classes of customers: (1) banana-wholesaling specialists, known as banana jobbers; (2) larger general produce wholesalers with processing facilities; and (3) direct-purchasing, self-processing, retail grocery organizations (see RHPF 2.7; CPF. 0.15; Tr. 1031; URX 55).

17. The method of ordering bananas from importers is of some significance because of differing prices which result. Importers' customers buy either at an advance-order price, a seaboard price, or a roller price. We now consider these three types:

(a) *Advance-Order Price*

Several weeks before a given ship is scheduled to arrive in port, United, after attempting to gauge market conditions on the anticipated date of arrival, sets an "advance-order price" for fruit to be delivered by that ship (Tr. 1405–1406, 1420, 1422). Approximately two weeks in advance of the ship's arrival and prior to its departure from the tropics, orders at the stated price are solicited from potential purchasers (Tr. 1104, 1824–1826). By placing such an advance order, the purchaser is able to guarantee himself a source of supply for his regular customers' needs rather than gamble on the ultimate availability of excess fruit at lower prices. He can not cancel without penalty (Tr. 2292). Advance-order opportunities are also available from Standard with less stringent requirements (Tr. 2291–2292; see RHPF 2.58). The term "preorder" is synonymous with "advance order" (Tr. 1824; RUPF p. 16).

(b) *Seaboard Price*

During the week before a given banana ship arrives in port,

the importers announce the price at which unsold fruit (fruit which has not been advance ordered) on that ship will be sold at dockside as the ship unloads (Tr. 1420–1421, 1423). This "seaboard price," is usually the same as the advance-order price (Tr. 1827). If, however, demand is less than anticipated by the importer, it will normally set a seaboard price which is less than the advance-order price (Tr. 1421, 1827). In such a case, the advance-order price is adjusted downward to the seaboard price (Tr. 1105–1107, 1827–1828). If demand is higher than anticipated, the seaboard price may exceed the advance-order price.

(c) *Roller Prices*

"Rollers" is a term used widely in the perishable-produce industry to refer to unsold products which traditionally are loaded on rail cars or trucks (Tr. 1103, 1416, 5933–5934). These rolling vehicles are then moved away from their point of origin (in the case of bananas the importation terminal) in the hope that somewhere along their path the produce can be sold before spoiling (Tr. 1103, 5933–5934). When a banana importer is unable to sell all the fruit from a given cargo before the ship finishes discharging, the bananas are committed to rail cars or refrigerated trucks at dockside and become rollers (Tr. 1416, 1828–1829). In subsequent days, the importers attempt to sell these "rolling" bananas to purchasers at a price which varies with market conditions and the age of the fruit (Tr. 1104, 1829). The price of rollers is always lower than the advance-order and seaboard prices and tends to get lower the longer the fruit remains unsold (Tr. 1104, 1416, 1829). During the relevant time period, rollers were irregularly available from both Standard and United in the southern California market area (Tr. 1103, 2290; RUPF pp. 17–18). They were offered to customers in rotation (RHPF 2.57).

It is not clear just how Driscoll Strawberry Associates sold its imports during the two years of its operation. Its prices were, however, lower than the other importers (Tr. 5899; URX 55).

18. Except in the case of respondent Harbor, which had direct conveyor delivery arrangements it sometimes used, bananas are delivered by the importers to customers at the back of trucks or in rail cars and then, at the customers expense, delivered to his ripening room (see findings, *infra,* relating to alleged discrimination for references).

19. During the period when stems were available, jobber ripeners, in addition to ripening bananas in controlled temperature rooms, cut and boxed the fruit and delivered it to their customers. After boxes packed in the tropics with the new Cavendish variety banana became available, the bananas were ripened in the original packages received from the importers with the assistance of an ethylene gas treatment in airtight refrigerated banana rooms (see CPF. 0.15; RHPF 2.11–2.13; Tr. 1208–1209).

20. Bananas should be ripened in from four to seven days. After seven days they begin to spoil. Bananas can be forced, but when bananas are ripened too fast, they are commercially less desirable because they have less "shelf life" at the retail level and they spot and deteriorate faster (Tr. 5936; see RHPF 2.5).

Banana ripening is thus an exacting procedure and requires experienced personnel and adequate facilities.

21. After ripening, the bananas purchased by banana jobbers are sold to other jobbers or to retailers. A large proportion of the retailers are chain-store organizations, many of whom maintain docks for the receipt of merchandise in downtown Los Angeles relatively near the downtown Los Angeles markets (see CX 402b map of Los Angeles, for location of the downtown markets). And, most of the banana jobbers maintain stalls in one or another of the markets within the downtown market area where they receive buyers and maintain a small quantity of bananas for stall delivery. A large proportion of sales are made by telephone, and many deliveries are made by banana jobbers to their retail customers' dock or receiving point (which might be a truck) in the vicinity of the market. There have been a few routes maintained by banana jobbers (see findings re: Count IV for further details).

22. There are five chain-store organizations in the southern California area that purchase directly from importers, ripen, or cause the bananas to be ripened, and then sell them through their retail stores. One of these chain organizations, Safeway, commenced ripening its own bananas in 1934. Two chains, Von's Grocery Co. (Von's) and Alpha Beta Acme (sometimes Alpha Beta or Acme), commenced ripening with the advent of the boxing program (Tr. 6067–6069). Another chain bought a produce jobber and uses almost the latters entire output. And, a fifth has ripening facilities to a limited extent (Tr. 6179, 2160).

## D. Price Discrimination (Count I, Sec. 2(a))

### 1. *Discriminatory Action in Direct Ship Delivery Solely to Harbor Plant*

23. Respondent Harbor Banana Distributors, Inc., and the Jebbia family business that Harbor succeeded to, have purchased bananas from respondent United at all times relevant to this proceeding (URX 55). The Jebbia family business was the most important banana jobber from the point of number of purchases and profitability with whom United did business (CX 169a–b; Tr. 1094, 1179).

24. During July 1965, Harbor completed construction of its waterfront banana processing plant on Pier A, Port of Long Beach, Long Beach, California (CX 209a). Harbor's plant was separated from the water by parts of two continuous string-pieces, one leased by United and one leased by Standard Fruit and Steamship Company and known respectively as Berth 209 and Berth 208 (CX 404b, 521a–b; Tr. 2061–2063; CPF. 1.2).

25. On July 27, 1965, United discharged 12,008 (40 pounds net) boxes of bananas from its ship, SS Junior, at Berth 209, Long Beach, by conveyors directly into Harbor's processing plant. All of the longshore labor for such discharge was furnished by United, but Harbor reimbursed United for that portion of the longshore labor performed in the warehouse (CX 145). Approximately once each week thereafter, until March 4, 1969, United made similar direct discharges to Harbor from ships at Berth 209, Long Beach, and maintained equipment there for that purpose. United made no charge to Harbor for the ship delivery service to Long Beach (C.RUA and RHA.; Tr. 1031, 1093–1096, 4903; CPF. 1.3–1.4).

26. During the years 1965 through 1967, United's weekly direct deliveries of branded and unbranded bananas to Harbor by ship from Berth 209, ranged from about 6,000 boxes to about 25,000 boxes. In 1965 United's ships discharged 21 times into Harbor's plant, delivering 194,842 boxes of bananas, an average of over 9,000 boxes per discharge, with a total valuation of $693,130.40 (CX 411a). In 1966 United ships discharged 51 times into Harbor's plant, delivering 536,208 boxes, an average of over 10,000 boxes per discharge, with a total valuation of $1,702,358.10 (CX 411b 1, 2). In 1967 United discharged 47 times into Harbor's plant, delivering 517,399 boxes, an average of over

11,000 boxes per discharge, with a total valuation of $1,721,138.10 (CX 411c 1–2; CPF. 1.5).

27. United's facility at Berth 209, Long Beach, was a temporary facility intended for Harbor's discharge only and no other United customer received delivery of bananas at Long Beach (Tr. 1170–1171; CPF. 1.7–1.8; CX 160).

28. From July 1965, until March 1969, all of United's other southern California customers received their deliveries at United's regular terminal located at Berth 147, Wilmington, (Tr. 1031, 1092–1097). United never delivered or offered to deliver directly to any other southern California customer (Tr. 1128) and never paid or offered to pay any southern California customers any compensation in lieu of delivery (Tr. 1126; CPF. 1.11–1.12).

29. Among the southern California customers of United that received delivery of bananas solely at United's regular terminal, Berth 147, Wilmington, California, were the following banana jobbers located in Los Angeles who competed with Harbor (when it was getting direct delivery) in the sale and distribution of bananas purchased from United:

Charles C. McCann Company and its affiliated firm, Tradewinds Produce, Inc., operating under the name W. W. Crenshaw Company (Tr. 3872) (until the asset purchase by Harbor in February 1968);

Pacific Banana Company (Tr. 3317);

Growers Marketing Company (Tr. 2885);

Pan Am Distributing Corp. (Tr. 2427) and

Los Angeles Banana Distributors (Tr. 2504).

In 1965 Paramount Banana Distributors also competed with Harbor, but Paramount's banana operation was taken over by a general produce wholesaler, Kaplan's Fruit & Produce Co., Inc., in 1966 that continued to compete with Harbor (Tr. 2719–2720).

30. Although the former vice president in charge of marketing testified that delivery at Long Beach was offered to all other jobbers (Tr. 1437), there was only one instance in which a jobber expressed interest (Tr. 1437). In that instance United failed to send its usual confirmation notice and the jobber did not send its trucks to Long Beach (Tr. 4456–4459). There were some preliminary discussions with jobbers, prior to the time the Long Beach discharge was started, looking toward interesting jobbers in participating in a facility to be established at Wilmington by United (Tr. 1482–1485). The terms and conditions of the agree-

ment were not stated, (Tr. 1632) and while some jobbers expressed some interest (Tr. 1475), they generally adopted a wait and see attitude (CX 52b; RHPF 6.14). No later offer was made (see CPF. 1.22–1.25).

31. The bananas sold contemporaneously by United to Harbor and to its other banana jobbers during the period July 1965 to March 1969 were sold for use, consumption, and resale in the United States and were (whether branded or unbranded) of the same grade and quality (Tr. 1099).

32. The direct delivery to Harbor occurred in commerce, as that term is defined in the Federal Trade Commission Act. Both United and Harbor were engaged in commerce, and the bananas were in the flow of commerce at all times until delivered to the retailer for sale to ultimate consumers. United caused the bananas to be boxed in the tropics in Central and South America. The bananas normally remained in their original boxes until delivered to the retailers. A substantial number of the bananas were advance ordered several weeks before delivery (CPF. 1.32; Tr. 1823–1842), and as Harbor's general manager testified, such advance orders are made to take care of the nucleus of Harbor's customers who buy on a regular and consistent basis, and most of the bananas must be ordered on that basis (Tr. 1832–1833; CPF. 1.33). These advance orders have an effect on the number of banana boxes that will be shipped from the tropics into the United States (Tr. 1110, 1832; CPF. 1.34–1.35). In addition, the very method by which United conducts its business necessitates the flow of messages, funds, orders, credits, and other communications across state lines and into, and out of, foreign nations (CPF. 1.37–1.42). Harbor admittedly makes regular sales to customers located in states other than the State of California (CPF. 3.179–3.195; CX 235a–240b). Its bistate management requires regular and frequent (interstate) communications.

33. The measure of benefit to Harbor is what its cost of delivery to its plant would have been if United had not provided direct delivery by ship. This amounted to approximately 9 cents a box by common carrier during the period from July 1965 to March 1969 at which time Harbor was also taking delivery in Wilmington as well as in Long Beach (Tr. 1882–1883, 2306, 5869). The suggestion that Harbor's payment to United of the cost of the longshore labor performed inside the warehouse should be considered as a deduction, is unsound (see RHPF 4.49–4.53).

Such payment was made as a matter of agreement between Harbor and United to simplify bookkeeping and to prevent Harbor from securing an extra loading service that was not rendered to other purchasers of United's bananas (Tr. 5124–5125, 1555–1556; CX 140). Also, the fact that this work could have been performed by teamsters at an unspecified cost were it not for the labor union agreements in force in no way lessens the benefit provided by United to Harbor for the direct delivery by steamship (see RHPF 4.51). The cost of the service inside Harbor's plant for which Harbor agreed to pay is Harbor's responsibility. Just as extra incidental loading services performed by a trucker cannot be deducted even though not performed for all other jobbers, so the extra restrictions imposed on Harbor by reason of union requirements cannot detract from the benefit granted by United.

34. By a parity of reasoning, positing that the benefit to Harbor is the test, the suggestion that there is no cost to United in making a ship delivery because it was not required to reschedule the ships' runs and because United was not required to add ships is equally unsound (see RUPF IV–125, IV–130—IV–136). The benefit to Harbor properly takes into account what it would have cost Harbor—not United—to secure delivery by water. Such cost would be approximately twice the cost of transportation by truck (see CX 409 M; CPF. 1.91–1.96). A tangential suggestion that since cargo rates to all West Coast ports are identical there is no discrimination (Tr. 5901–5932) is also beside the point.

35. Still another suggested measure of differences (see CPF. 1.98) is the cost of delivery from Wilmington to the downtown market area where many competing jobbers had their plants. This cost is approximately 12 cents to 12½ cents a box by common carrier (see CPF. 1.97). Like the cost to Harbor of the labor charge within its plant, this cost is not a sound test of discrimination by United. It cannot be attributed to United.

36. Whether the differential in Harbor's favor be 12 cents, 9 cents, or twice that amount, the difference is sufficiently significant that damage to competition must be inferred. Such significance is demonstrated by the figures of Harobr's expert and the testimony of competing jobbers (RHX 109, p. 22 and p. 36, fn. 40; CPF. 1.00–1.114).

37. From the foregoing findings we have determined that respondent United discriminated between its customers by making a direct delivery to respondent Harbor's plant, and we must infer

that such discrimination has injured competition. We now turn to respondent United's defense of good-faith meeting of competition (RUPF pp. 19–91).

## E. The Meeting Competition Defense

### 1. *Background*

38. For many years United had been the sole supplier of bananas to the Jebbia family business and the only regular importer from the tropics to the Los Angeles area. In 1960, Standard Fruit and Steamship Company dispatched ships to the port of Wilmington in Los Angeles, and under the able direction of Albert Maligie, who was West Coast manager, it started a vigorous campaign to secure business from jobbers and from retail ripeners (URX 1b, 2b; Tr. 1691; RUPF II–9). Standard's efforts met with considerable success, and the shipside price of bananas in Los Angeles dropped 2 cents a pound (Tr. 6107–6108). Nationwide, between 1960 and 1964, Standard's sales rose from $54 million to more than $85 million and it turned a loss into a profit (URX 46–52). Standard secured the business of the Safeway chain; and by 1964, when the Acme and Von's chains became self-ripeners, they purchased large quantities of bananas from Standard. Pan Am Distributing Corp., one of the smaller jobbers, shifted to Standard. Even the Jebbia family bought about 15 percent of their imports from Standard (RHPF 5.72; URX 55).

39. About this time United was attempting a recovery from a series of events which had seriously curtailed its earning power (CX 175). These included:

(a) Extensive damages to its plantations due to Panama disease and blowdowns.

(b) Changeover from Gros Michel variety to Valery/Cavendish bananas, which required development of a boxing program to replace stems.

(c) Expropriation of assets by the Cuban government.

(d) Changeover of management.

(e) Emergence of Ecuador as a seemingly limitless source of supply to Standard with deterioration of banana prices worldwide (RUPF II–1; CX 177, III–2, Tr. 1204–1209).

A bright point in United's sales picture was its sales to the Jebbia family, its largest customer in southern California and second largest in North America. A profit of some $880,000 had

been realized in 1963 from the Jebbia business (Tr. 1209–1210, 1283, 1468–1470; CX 37a–b; RUPF II–35).

40. As early as mid-1962, the Jebbias expressed concern to United about the construction by chain stores of their own ripening rooms and their purchase of bananas direct from the importers. The impending change from importation of stem fruit to boxed fruit increased that concern (Tr. 1200–1212, 1140–1141, 1146, 1147; RUPF II–2). In July 1962 Dominick and Norf Jebbia visited United's top management in Boston and sought to prevent boxing and direct sales to chain retail stores (Tr. 1439, 1212–1214; RUPF II–3). United refused, with an explanation, but it agreed to give ample notice of conversion to boxing (RUPF II–4; Tr. 1440–1443; CX 3a–b). In December 1962 Norf Jebbia proposed construction of a waterfront ripening facility in Wilmington adjacent to United's terminal to meet the chain-store threat with increased efficiency (Tr. 1443; CX 7; RUPF II–6). United gave him little encouragement (Tr. 1446). In July 1963, Norf Jebbia again went to Boston to urge United not to sell to chain stores. Again, he received a negative reply (Tr. 1447–1448; CX 10). Thus, there was, presumably, considerable disenchantment of the Jebbia family in their relationship with United.

41. Meanwhile, Standard found its facility at Berth 160 in Wilmington inadequate for its increased business, and early in 1963 it started negotiations with the Port of Long Beach for the construction of a new terminal there (RUPF II–9; URX 172; Tr. 1690). Albert Maligie had also been attempting, without success, to sell the Jebbias (Tr. 2281–2286; RUPF II–11); but when Standard announced construction of its new terminal, Norf Jebbia told Mr. Maligie of the Jebbias' interest in constructing a processing facility adjacent to the proposed Standard terminal (Tr. 2284; RUPF II–10). Extensive negotiations ensued during the remainder of 1963, and joint plans were discussed with M. A. Nishkian & Company, which designed both the Jebbia and the Standard facilities (RUPF II–13). Negotiations between Standard and the Jebbias were concluded in January 1964, and an agreement was entered into for the construction of adjacent facilities to permit the passage of bananas across Standard's wharf and into Jebbias' banana rooms (Tr. 2287). Standard agreed that if it withdrew from the terminal within 20 years it would pay to the Jebbias the then unamortized portion of their investment (Tr. 2287; RHX 11; RUPF II–16). About the time

of the signing of this agreement, the Jebbias began to purchase bananas from Standard, and during the remainder of 1964, they bought about 15 percent of their total requirements from Standard (URX 55r, s; Tr. 2287; RUPF II-17).

42. Although the Jebbias did not inform United that they were planning an arrangement with Standard, at a New Year's Eve dinner, December 31, 1963, Norf Jebbia told Mr. Fox, then United's vice president, that they were considering a location other than Wilmington and that he was going to New Orleans for Mardi Gras as the guest of Dr. D'Antoni, Standard's president. Since Mr. Fox knew of Standard's plans for a terminal, he reasonably asumed that the Jebbias might be joining forces with Standard (Tr. 1217-1219; RUPF II-14). On January 27, 1964, the Jebbias sought a guarantee of one boat delivery a week to a new waterfront facility at an unspecified place with a penalty that United would pay the cost of their facility minus 5 percent a year of operation, if boat delivery were discontinued (RUPF II-20; CX 13b). On February 27, 1964, United responded that it would make direct delivery on payment of expenses but would not agree to an indemnity if the deliveries were discontinued. Mr. Fox proposed that as an alternative to a Jebbia waterfront facility, United would construct a joint jobbers ripening facility at Wilmington (CX 17a; RUPF II-21-22). A news article the following month, describing a facility being built adjacent to Standard's terminal, reasonably increased the concern of United's management, since it asumed that the plant was being built for the Jebbias (CX 16A, 4b; RUPF II-15).

On April 16, 1964, Norf and Dominick Jebbia appeared at the Boston office of United without prior arrangement. Norf Jebbia demanded that United sign an agreement that he brought with him. The agreement provided that United would build a waterfront ripening facility at an undisclosed location for lease to the Jebbias (CX 26b-d). Norf Jebbia told the group of United executives, who dined with him and then met with him at United's offices that night, that if United did not sign, its major competitor would. All the United people recognized that Norf Jebbia meant Standard. Mr. Jebbia at first insisted that the agreement be signed that night, but later he relented and granted an overnight delay. During the delay United's attorneys, at the request of Mr. Fox, drafted a cover sheet to the proposed agreement providing that it should be subject to the approval of United's board

of directors. Then the agreement was signed in its conditional form (Tr. 1229–1230, 1462–1467, 1346; RUPF II–29).

United at this point had not yet been informed that the Jebbias had reached an agreement with Standard, nor did it know of the location of the proposed facility, so, counsel caused an inquiry to be made in Los Angeles. This inquiry resulted in United's receiving confirmation of its suspicion that Standard and the Jebbias had signed leases for adjacent property with the city of Long Beach and that the Jebbias' lease was conditioned upon Standard's proceeding with the construction of its terminal prior to July 31, 1964 (RUPF II–30—II–33; Tr. 1345–1346).

In May, United further learned that the Jebbias had broken ground for the new facility at Long Beach (RUPF II–37; Tr. 1485–1486). United's management was concerned, and with good reason, that it would lose all or a large portion of the Jebbia business to Standard (RUPF II–37; Tr. 1486). However, United's board of directors at its May 25, 1964, meeting refused to ratify the conditional contract made with Norf Jebbia, on April 17, 1964 (RUPF II–42; CX 44; Tr. 5069, 1234). United's board was reasonably concerned that the ratification of the April 17, 1964, agreement might be construed to be in violation of a consent decree filed February 4, 1958,[13] presumably those provisions that prevented United from extending credit to banana jobbers or participating directly or indirectly in ripening bananas.

43. The extent of United's concern about the possible loss of the Jebbia business is indicated by United's records analyzing the effect of such loss (URX 32a–b) and by the remedial action taken by it in June 1964 of dispatching a second ship to Wilmington in an attempt to increase the banana purchases of other jobbers (see RUPF II–39; Tr. 1412).

44. Mr. Fox attempted to renegotiate the April 17, 1964, conditional agreement with the Jebbias prior to its rejection by the board of directors in May, but these attempts incensed Norf Jebbia to such an extent that he expressed open distrust of United's executives (CX 40; RUPF II–40). Immediately following the board of director's action, three senior executives of United attempted to work out something else that might retain the Jebbia business. One suggestion was that United would establish its

[13] We take official notice of the decree of the United States District Court for the Eastern District of Louisiana entitled *United States* v. *United Fruit Company*, CCH 1958 Trade cases ¶68,941.

terminal at Long Beach and abandon its Wilmington terminal (CX 45; RUPF II-43, II-44). Although this suggestion was actively canvassed within the United organization and with port authorities (see RUPF II-48—II-52; CX 79); by the end of August 1964 an economic study showed that significantly higher costs would result from such a change. This caused the project to be abandoned (RUPF II-52; URX 28; CX 91).

45. Other alternatives were considered, including United's attempts to assist the Jebbias to secure loans, which were abortive, and the suggestion that United use the Standard terminal jointly with Standard, which presented legal difficulties [14] (RUPF II-53, II-54; CX 95; Tr. 1133-1134). Mr. Norf Jebbia continued, however, to manifest anger and distrust (RUPF II-55). He later became incapacitated and Dominick Jebbia undertook the management of the family business (RUPF II-57).

In October 1964 Dominick Jebbia and Dr. D'Antoni, then president of Standard, had a conference about Norf Jebbia's ill health and Dominick Jebbia's desire to sell 50 percent to 75 percent of their banana-ripening plant to Standard (Tr. 5221-5222). Dr. D'Antoni explained that he was in the midst of selling 30 percent to 38 percent of his family's interest (Tr. 5220) in Standard to Castle and Cooke, Inc. He did not think that Standard would purchase an interest in Jebbia (Harbor) but because of his position he had to offer the proposal to Standard first (Tr. 5223, 5226). Dr. D'Antoni presented the matter to the board of directors of Standard in November after the sale of his family's interests to Castle & Cooke, Inc., had been consummated and he had become chairman of Standard. The board turned down the proposal (Tr. 5227). About two days later Dr. D'Antoni sent Dominick Jebbia a check for $1 million for a half interest in an investment of the D'Antoni family in the Jebbia family business with the understanding that the Jebbias would run it (Tr. 5228-5229). Dr. D'Antoni left the drafting of the various papers to Louis A. Pilie, his family's attorney, and took no active role in the management until Harbor began operations in July 1965. Albert Maligie, the former West Coast manager of Standard, was hired by Dominick Jebbia in December 1964 to run the business of Harbor. He went to work in March 1965 (Tr. 5233). The Jebbias planned to, and did, consolidate their banana business into Harbor (Tr. 5234), except their San Diego plant. Against this back-

[14] Presumably the consent decree mentioned in fn. 13.

ground, we will consider what competition Standard provided and how United reacted.

2. *Standard's Competition and United's Awareness of It*

46. Well over a year before Harbor, which succeeded to the Jebbia business, commenced operations, United was informed that Standard proposed to construct conveyor belts that led directly into the Jebbia (Harbor) plant (then under one of the Jebbia company names) (URX 17c; Tr. 1440–1441; RUPF II–51).

47. After the summer-long attempts to placate Norf Jebbia, Mr. Fox became president of United, and Mr. Cornuelle became executive vice-president and assumed responsibility for banana operations (RUPF II–56; Tr. 1193). In the early fall Mr. Fox and Mr. Cornuelle called on Mr. Dominick Jebbia and his son Philip at their office in Long Beach where the United officers saw an architect's painting of a Standard ship discharging bananas directly into what is now the Harbor plant (RUPF II–59; Tr. 1247), and they also observed that the construction of the facilities was well under way (Tr. 5077). Moreover, when they talked to Dominick Jebbia, he explained that the plant was designed to process stems on the first floor (which then only Standard was importing) (RUPF II–62). This made entirely believable Dominick Jebbia's threat that if United failed to meet the competition of Standard, the Jebbias were going to buy their bananas, or most of them, from Standard (Tr. 5150, 1580–1581; RUPF II–63). The threat prompted Mr. Cornuelle to suggest (not make a commitment) that United might consider making one ship delivery a week to the Jebbia (Harbor) facility.

The entirely creditable testimony of both Mr. Fox and Mr. Cornuelle (Tr. 998–1301, 5060–5185) that they were concerned about losing a substantial portion of the Jebbia (Harbor) business and felt it necessary to meet Standard's competition to counter it (RUPF II–66), is corroborated by contemporaneous documents (URX 30a–b, 31a–b), particularly those showing the effects of the loss of the Jebbia business (URX 32a; see RUPF II–69). Moreover, the memorandum recording the second meeting (October 27, 1964) between Mr. Cornuelle, Mr. Hoelle, and Dominick and Philip Jebbia, shows an awareness of the proposed Standard operation and that Standard would unload its bananas in Jebbias' (Harbor's) ripening room without charge. Although

the United officials were not willing to agree to do this at the time, they did hold themselves out as willing on 3-months' notice to make one ship delivery a week to meet Standard's competition (URX 36a-c).

48. Early in 1965, between the date of the meeting with Dominick Jebbia, Philip Jebbia, and Messrs. Fox and Cornuelle and the date of the first ship delivery to the Harbor plant, United officials met and attempted to placate other jobbers (RUPF II-85, II-86) and carefully reviewed and reconsidered the matter (RUPF II-87, II-88; see Tr. 5060-5184). United determined that it might be giving more than delivery by ship if it paid for the loading inside Harbor's plant. So it refused to pay for it and arranged to bill Harbor for this cost. Harbor agreed to this with some reluctance (RUPF II-92, II-93; CX 140). United also limited its deliveries of bananas to Long Beach to bananas which had been preordered (RUPF II-93; CX 140). In the last two described respects United's reaction to Standard's competition was less than a full meeting of competition (see RUPF II-93).

49. During the almost four years that ship delivery was made by United to Harbor, United officials periodically reviewed the situation and made certain that it was still necessary as well as economical for United to continue to meet Standard's competition (Tr. 5126-5127). The fact that Harbor, because of labor costs and convenience, failed to utilize Standard's belt delivery did not lessen the threat its use from time to time posed to United (Tr. 5129).

50. In March 1969 when United ceased making delivery to Harbor by ship, Harbor reacted by greatly increasing its purchases from Standard (RU Reply Brief pp. 34-38; Tr. 5123).

51. By reason of the foregoing we find that United's action in making delivery to Harbor by ship was action taken in good faith to meet the lawful competition of Standard. Accordingly, we find it unnecessary to consider further the other proposed findings concerning Count I of the complaint. We have, however, dealt with the position of counsel supporting complaint in Appendix A [p. 118]. We pass now to the facts relating to Count II, the alleged inducement of the discrimination.

F. Inducing Price Discrimination (Count II, Sec. 2(f)

52. Because of the foregoing findings that United in good faith met the competition of Standard in the activity complained

of, it follows that Harbor, although clearly it induced the activity of United, could not have knowingly induced or received a discrimination in price prohibited by Section 2 of the Clayton Act. We accordingly now turn to Count III of the complaint, the alleged monopolization by Harbor aided by United.

### G. Attempted Monopolization (Count III, Sec. 5)

#### 1. *The Charge*

53. The complaint makes it clear that the violation of Section 5 of the Federal Trade Commission Act charged in Count III is the attempt to monopolize the sale and distribution of bananas in the Los Angeles area by four various acts and practices among others, that is (1) selling bananas at unreasonably low prices; (2) developing over-capacity; (3) inducing discriminatory terms; and (4) acquiring the business and assets of its largest competitor. There is a separate charge in the count (Par. 15) that the acts taken separately constitute unfair practices, but this is coupled with the allegation that they have been conducted, engaged in, and adopted for the purpose of creating a monopoly in respondent Harbor. Hence, the specific acts (except those separately stated in separate counts) are not charged as separate violations of Section 5 absent the attempt to monopolize charge.

#### 2. *No Direct Evidence of Intent*

54. There is no contention that the record contains any admission of a specific intent on Harbor's part to create a monopoly in the Los Angeles area, and it has been expressly denied that United desired Harbor to reach a monopoly position (Tr. 1260–1261, 1568–1569, 5132–5134). The supplier-customer relation between United and Harbor and United's concern for other jobbers' businesses lends credence to this denial (see RUPF pp. 253–261).

Hence, in the ensuing findings we shall consider the actions taken in the competitive setting disclosed and attempt from such an analysis to determine whether or not the necessary intent to monopolize can be attributed to Harbor. Our first concern will be the competitive setting or the relevant market as regards the product market and the geographic area.

3. *The Relevant Market*

55. What constitutes the relevant market is perhaps the most seriously disputed phase of this proceeding. Complaint counsel take the position that the relevant market for the charge of attempted monopolization is the same as for the charge of violation of the antimerger law (CPF Vol. II, pp. 35–36). Respondent United vigorously denies this and maintains that the market for monopolization purposes is much more restricted at least in the geographic market analysis required (RU Reply Brief pp. 87–90). Respondent Harbor appears to agree with complaint counsel as to this phase of the applicable law but with United on the facts (RHPF pp. 46–48, 55–58). There appears to be agreement that an analysis of the relevant market requires an analysis of three separate factors, that is, the product market, the geographic market, and the participants to be included. Fortunately, United claims the same geographic market for the Section 2 charge as Harbor does for both, so our analysis of the market at this point can be applied to the Section 2 of the Sherman Act charge, that is, the charge incorporated in Section 5 of the Federal Trade Commission Act (Count III), and to the Section 7 of the amended Clayton Act charge, involving the purchase of McCann Crenshaw (Count IV). We shall now consider the facts under each of the following headings denoting the three factors bearing on the relevant market.

4. *The Product Market*

56. Harbor takes the position that realistically bananas compete with other fruits and, accordingly, that one cannot separate out for consideration just the sale and distribution of bananas (RHPF 36–46). Respondent United appears to make no such claim and complaint counsel strongly supports the position that bananas are clearly a separate product on the basis of competitive realities (CPF Vol. II, pp. 37–44). With these contentions in mind we make the following findings.

57. Bananas are an identifiable, unique botanical product (Tr. 5631). Substantially all of the bananas sold in the United States are grown outside this country, and most are grown in South and Central America (CPF 1.31, 3.58). They are so significant a food item in the United States that 1 percent of each dollar spent on food is spent on bananas (Tr. 1267–1268).

58. Importers' ships used for transporting bananas from tropical growing regions to the United States are designed to allow the bananas to be held at a temperature of between 54 degrees and 56 degrees. Insulation, air-circulating equipment, and refrigerating equipment are necessary (Tr. 1085; CPF 3.59).

59. Bananas received from the grower-importers, unlike other fruits and produce, are not ready for consumption. They must be ripened under controlled conditions with expert supervision (Tr. 1297; CX 514; CPF 3.60). (As Mr. Fox put it, "It is a very tricky, critical business" (Tr. 1297).)

60. For the varieties now used, the ripening process requires that ethylene gas be put into the airtight rooms where bananas are ripened. If the proper amount of gas is added at the proper time and for the appropriate length of time, the internal process of ripening will begin. At that point, the ethylene gas is removed from the rooms and the fruit continues to ripen (Tr. 3262–3263; CPF 3.61).

61. While some fresh fruits are available only seasonally, bananas are available throughout the year (Tr. 5451–5452; see also, RHX 207; CPF 3.64). Bananas also differ from any other fruits available in the United States because of the necessity of their being consumed within a very limited period after they are harvested and shipped. The product is highly perishable and, in practice, cannot be stored or processed for later sale (see RHX 100, p. 7; CPF 3.65).

62. The two principal importers of bananas into the United States attempt to adjust the harvesting and importation of bananas so that the amounts available are lowest when new harvests of other fresh fruit are available (RHPF 3.13–3.14; RH Reply Brief, pp. 59–61; see Tr. 5811–5812).

63. The unrebutted economic proof offered by respondents' expert agricultural economist Dr. Henry B. Arthur, a professor emeritus of Harvard Business School (Tr. 5350–5838), was based on his opinion that he could not exclude from the market "those considerations which represent an active constraint upon Harbor's freedom to make its own decision regarding the prices it sets, the customers it can succeed in persuading to buy from it" (Tr. 5406). Further, he was of the opinion that in determining a market he would ascertain "what are the alternatives that as a matter of actual commercial practice are taken into account by the participants * * *" (Tr. 5409).

64. Dr. Arthur thus testified that "* * * a buyer who is looking for fresh fruit or is about to buy bananas would certainly

as a practical matter take into consideration other fresh fruits as at least potential, in many cases very real, alternatives." (Tr. 5410)

65. Dr. Arthur made a "Report" (RHX 100) which was received in evidence over objection as constituting his economic opinion (Tr. 5790–5794). Arguments and matters not supported by the record have been disregarded in accordance with the limitations expressed at the time said exhibit was received (*id*). As noted in his report, Dr. Arthur was author, with others, of "Tropical Agribusiness Structures and Adjustments—Bananas," published in 1968 by the Division of Research of the Harvard Business School (URX 100, p. 3 and Attachment, p. 2). This book was the result of extensive research and is the only major publication relating exclusively to the banana business. Dr. Arthur's experience has been primarily in matters pertaining to agriculture, since he was for many years (1939–1960) an economist for and manager of the Commercial and Economic Research Departments of Swift & Co. During this employment, he was consultant to or a member of a number of governmental organizations, including a number of foreign governments. He was prominent in a number of associations, including the Conference of Business Economists, the American Marketing Association, the American Economic Association, and the American Statistical Association.

66. In preparing his report (RHX 100, p. 24), Dr. Arthur accepted a statement from counsel for Harbor to be used as "legal guidelines." This statement appears at pages 24 and 25 of his report (RHX 100). On the basis of these legal guidelines Dr. Arthur expressed the opinion that the product market "includes the competition of all fresh fruits and their principal wholesale handlers as well as the banana ripeners and jobbers" (RHX 100, p. 26).

67. The legal guidelines by which Dr. Arthur was governed in his report (his expertise did not include antitrust or trade regulation experience, except in connection with the meat packers consent decree modification where he prepared evidence and consulted with counsel (see report, RHX 100, Attachment)) primarily consisted of a quotation from the *Brown Shoe* decision of the Supreme Court, 370 U.S. 294 (1962) and did not discuss the recent decisions differentiating products or services, such as: *Reynolds Metals Co.* v. *FTC*, 309 F.2d 223, 236 (D.C. Cir. 1962);

*United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963); *United States* v. *Alcoa,* 377 U.S. 271, 277 (1964); *United States* v. *Grinnell Corp.,* 384 U.S. 563 (1966); *Case-Swayne Co.* v. *Sunkist Growers, Inc.,* 369 F.2d 449, 456–457 (9th Cir. 1966), *cert. denied,* 387 U.S. 932 (1967), *rev'd on other grounds after retrial,* 389 U.S. 384 (1967), *rehearing denied,* 390 U.S. 930 (1968); *General Foods Corp.* v. *FTC,* 386 F.2d 936, 940 (3rd Cir. 1967), *cert. denied,* 391 U.S. 919 (1969); *Columbia Broadcasting System and Columbia Record Club* v. *FTC,* 414 F.2d 974, 979 (7th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970); *Balfour Co.* v. *FTC,* 442 F.2d 1, 10 (7th Cir. 1971). Attention to Commission decisions were also omitted including the Commission's decision in *Kennecott Copper Corp.* D. 8765 (May 5, 1971 p. 4 mimeo. Opinion) [78 F.T.C. 744, 913]. Accordingly, his economic conclusions do not fully conform to the legal principles supplied by the more recent cases and cannot be accepted without further analysis based on such other cases and generally applicable trade regulation principles.

68. While admitting that bananas are an identifiable unique botanical product, Dr. Arthur takes the position that there is a very substantial interaction among fruits on the basis of a number of assumptions, some of which are not supported by the evidence as it relates to the conditions pertaining in Los Angeles.[15] He admits that the statistical proof is disappointing. But he bases his opinion on the existence of what he calls interfruit competition (Tr. 5810–5812). He quotes in his testimony a statement from his research study that "the changing supply and price of other fresh fruits is probably the major external factor influencing the aggregate consumer demand for bananas from month to month" (Tr. 5816). It can thus be seen that he is focusing on alleged competition between fruits at the retail level while this proceeding is concerned with wholesale distribution. Moreover, he is stressing "impulse" buying by the individual consumer when clearly the wholesaler is concerned with the buyer judgment of the retailer with whom he deals as to what commodities should be bought. Just as green corn, which Dr. Arthur rejects as part of the product market, has its impact on the retail banana market, so have apples, oranges, melons, etc. The impact is reflected in the purchases by retailers. Dr. Arthur

[15] One of his assumptions is that most banana ripening is done by nonspecialists. That is not true in the Los Angeles area (see URX 55).

recognizes that since there is no absolute independence of one commodity from another (Tr. 5817) it is in the exercising of an individual judgment where the line should be drawn.

69. We find on the basis of all of the evidence and because of the unique physical characteristics of bananas—the way they are imported and handled and the special care with which they are prepared before being sold at retail—that bananas in the context of this proceeding are a separate product market. We turn now to the geographical market.

5. *The Geographic Market*

70. Just as is the case with the product market, there is a wide gap between the positions of counsel supporting the complaint and those of counsel for the respondents. The latter present a solid front[16] that the appropriate geographic market is composed of the nine southern counties of California. Counsel supporting the complaint considers only Los Angeles and Orange Counties as the geographic market. Again Dr. Arthur was the only economist called,[17] and he was guided, as before, by counsel's description of the applicable law.

71. Dr. Arthur in his report states: "The nine-county area appears * * * to represent the relevant geographic market for the analysis and evaluation of the questions at issue." After disapproving of narrower and wider areas he summarizes the facts he considered. These can be referred to (using the letters in the original for reference) as follows:

(a) Same source of supply exists for jobbers and produce wholesalers.

(b) Same source of supply exists for jobbers and chain stores.

(c) Jobbers sell to chain stores who distribute throughout the area.

(d) Some chain stores operating in the whole area process their own bananas.

(e) Smaller chains serviced by jobbers compete with larger ones.

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[16] Dr. Arthur regards as unimportant the Imperial Valley and San Luis Obispo County (Tr. 5775, 5528).

[17] Mr. Joseph Wormack who had been called as a witness for the government to authenticate its charts testified only as an accountant and did not take responsibility for the choice of persons included (Tr. 303–930). Dr. Clarence W. Elliott also was primarily a cost-accounting witness (RHX 109), and Mr. Steele was primarily a supervisor (Tr. 18–195).

(f) Retailers have a choice of buying in downtown area or from other locations in area.

(g) Certain named jobbers operate from a location outside two counties.

(h) About half of the business done has no contact with downtown market.

(i) There is a common price-sensitivity and retail chains often have the same prices throughout the area.

(j) Freeway system facilities fast economical truck transport throughout area. (RHX 100, pp. 26–28.)

72. Three legal problems are immediately apparent in considering Dr. Arthur's analysis. First, we have already determined that bananas are the product; hence, reference to other product jobbers is irrelevant. Second, this proceeding concerns restrictions on the wholesale distribution of bananas; hence, reference to the retail, self-ripening chains' sales to consumers are of no legal significance in determining the wholesale market. Third, the relevant counts of this proceeding (Counts III and IV) concern the wholesale sale—not wholesale purchase—of bananas; hence, reference to the competition of self-ripening chains for the purchase of bananas from importers is also irrelevant.

73. There were eight jobbers (including respondent Harbor) who had stalls and some ripening facilities in the downtown Los Angeles market area during the relevant period, all but one of which handled principally bananas. This area is located within the red rectangle drawn on a map of Los Angeles and the location of each jobber is designated thereon (CX 402b). Some jobbers have more than one location.

74. There are six jobber-ripeners who have had plants at some time during the relevant period outside of the Los Angeles market. Some of them also have had plants in Los Angeles (URX 55; RHX 100).

75. The California freeway system facilitates fast and convenient truck transportation throughout the nine southernmost counties of California (Tr. 6186–87; CX 403). However, the distance between San Diego and Los Angeles is over 120 miles and places practical limits on ripeners' ability to backhaul bananas which have been ripened in San Diego or some other location away from the ports (see Tr. 1746). And, according to Dr.

Arthur the banana prices in San Diego were seldom identical to those in Los Angeles (Tr. 5801).

76. During the investigation and preceding the issuance of the complaint herein, Albert Maligie, general manager of Harbor, wrote John Gabriel, a Commission attorney, on August 1, 1967, describing Harbor's business as follows:

> Harbor Banana Distributors, Inc. is engaged in the banana wholesale jobbing business with facilities located in the Port of Long Beach at 1420 Panorama Drive. Our phase of the business is principally purchasing green bananas from the importing companies, ripening them, and *distributing them to retailers principally in Los Angeles and Orange Counties.*
>
> All of our *bananas are ripened* here *at the main plant.* We have a *distribution point at 1707 East 7th Street in Los Angeles* and we maintain a *stall in the 7th Street Market.*
>
> We have sales that are handled by truck delivery here in Long Beach to retailers, warehouses and loading docks in the market area and other various locations. *Some of the retailers* that *we deliver to directly from here to their produce docks in the market area are A & P, Big Bear Foods, Boys Market, Crawford Stores, Food Fair Stores, Hughes Markets, Lucky Stores, Market Basket, Mayfair Markets, Ralph's Grocery Company, Sage's Market and Thriftimart.* Practically all other accounts that we serve downtown are serviced through the distribution center or through the market stall.
>
> *We have a route truck that has a steady list* of customers which he serves on a regular daily basis. *Most of these accounts are the smaller accounts* and small volume customers that require a great deal of attention and service.
>
> *We also have one customer in San Bernardino County. We deliver this account to his produce warehouse in San Bernardino* from here at our main warehouse in Long Beach.
>
> (Emphasis supplied)
> (CX 220a–b)

Copies of this letter were sent to Harbor's then attorneys.

77. At the hearing, Mr. Maligie testified that his buyers are located principally in Los Angeles and Orange Counties (Tr. 1704). He also testified that he regarded his letter (Exhibit 220a–b) as substantially correct (Tr. 1707). Since the letter had been objected to by United, *voir dire* examination was allowed to Mr. Thumann, United's Los Angeles counsel (Tr. 1710–1711). During the *voir dire* examination, Mr. Thumann brought out the fact that Big Bear Food Stores (Big Bear) were located in San Diego; that Harbor delivered to Big Bear in the downtown market; and that jobbers in San Diego like Coast Citrus Distributors (Coast Citrus) also sold to Big Bear in San Diego (Tr. 1710). Similarly, Sage's Markets (Sage's) located in the San Bernar-

dino–Riverside area, purchased bananas both from suppliers in the downtown Los Angeles area and from some not located there. Millage Produce in San Bernardino–Riverside was named as one, and Mr. Maligie averred that he was in competition with Coast Citrus and with Millage Produce (Tr. 1710–1711). Mr. Thumann then withdrew United's objection to CX 220a–b and it was admitted against all parties (Tr. 1711–1712).

78. We accordingly find that Harbor's business was principally in Los Angeles and Orange Counties (Findings 73–77 [pp. 93–95], *supra*).

79. We also find that: (1) Harbor did business with retail firms that had stores and customers located in all of the nine southernmost counties of California; (2) Harbor maintained during part of the relevant period a truck route serving various small customers, including some in San Diego and Imperial Valley Counties (Tr. 2176–2179); (3) State Brothers was the large customer in San Bernardino County, referred to in Mr. Maligie's letter; (4) Grand Central Produce, a produce jobber, and Sage's in 1965–1967 received purchases incidental to the Stater Brothers' delivery; and (5) on occasion, Harbor delivered to Giordano's Markets in Santa Barbara County and to Big Bear stores in San Diego (see RUPF V–9).

80. Similarly, while the business of the other seven Los Angeles based jobbers was principally in the Los Angeles market and in making delivery to the chainstore docks located nearby, they too on occasion made deliveries outside Los Angeles and Orange Counties (see RUPF V–9, V–13). And, on occasion some of the six jobbers located outside Los Angeles made deliveries into Los Angeles or Orange Counties (see, RUPF V–10).

81. A substantial number of customers of Harbor who take delivery inside the counties of Los Angeles and Orange have retail stores and principal offices outside those counties; and they are potential, if not actual, customers of jobbers located outside the two counties (see RUPF V–11). Similarly, the other jobbers in Los Angeles who deliver to customers within the area and who have stores outside the area are potential, if not actual, customers of jobbers outside the two counties (see RUPF V–13). However, the jobber-witnesses made it clear that as a practical matter their principal competition was within Los Angeles and Orange Counties (Tr. 2419–4484).

82. By reason of the foregoing, I find that the principal area

of wholesale competition for Harbor and for the seven other Los Angeles jobbers is Los Angeles and Orange Counties and that those counties comprise the geographic area with which we are herein concerned (Findings 74–80 [pp. 93–95], *supra*).

6. *Participants in the Market*

83. At the commencement of respondent Harbor's operations in July of 1965, the following jobbers were operating in the Los Angeles market:

Harbor Banana Distributors, Inc.
Charles C. McCann Company
W. W. Crenshaw Company
Pacific Banana Company
Growers Marketing Company
Pan Am Distributing Corp.
Paramount Banana Distributors
Haggai Banana Supply
Janelli Banana Company
Los Angeles Banana Distributors

(see URX 55; CPF Appendix A).

84. Prior to Harbor's opening and early in 1965, Barnes Banana Company, a jobber which had been operating in the Los Angeles market, lost its ripening facility by fire (RUPF IV–104; Tr. 2363). On October 18, 1965, Charles W. McCann Company acquired W. W. Crenshaw Company which had until that time been operating in the Los Angeles marketplace as a banana jobber. Thereafter, it was operated as Tradewinds Produce, Inc., a subsidiary of the purchaser (RUPF IV–25 to IV–27; Tr. 3696–3705).

In February 1966, Paramount Banana Distributors leased from Janelli Banana Company ripening rooms formerly operated by Haggai Banana Supply whose business Janelli Banana Company had purchased. The operation was in June 1966 taken over by Kaplan's Fruit and Produce Company, a multiline produce dealer (RUPF IV–93–98; Tr. 2363–2369).

85. In February 1968, Charles C. McCann Company sold certain of its assets to respondent Harbor (RHX 4a-k), and in January 1969, Coast Citrus Distributors, San Diego, opened ripening rooms in the Los Angeles marketplace (Tr. 2382–2383).

86. Immediately after McCann ceased doing business in Febru-

ary 1968, the following constituted the participants in the Los Angeles market:
Harbor Banana Distributors
Pacific Banana Company
Growers Marketing Company
Pan Am Distributing Corp.
Kaplan's Fruit & Produce Company
Los Rngeles Banana Distributors (Findings 82–84 [pp. 95–96], *supra*).

We turn now to the incidents that the complaint charges constitute the attempted monopolization. First we consider the pricing.

7. *The Unreasonably Low Pricing Charge*

87. The complaint charges that respondent Harbor was "selling or offering to sell bananas at unreasonably low prices approaching or below the cost of purchasing, handling, processing and distribution [sic]." In their answers Harbor denied the charge, and United denied it had knowledge of the facts charged.

The findings proposed by the parties establish that there is no dispute that Harbor in October 1966 adopted a pricing policy of charging 45 cents above the seaboard price for both United's and Standard's bananas, reducing that price if there was a large rolling market to 45 cents above the average cost (RUPF IV–107–109; RH Response, pp. 65–66; see CPF 3.102). It is also not disputed that Harbor was losing money at that price (RH Response, p. 66; see, RUPF, p. 158 fn. **; RHX 109, Attachment B; CPF 3.103). We accordingly so find.

8. *United's Defense to the Charge of Aiding Harbor's Pricing Policy*

88. United takes the position that it had no knowledge of Harbor's action until after it took place and that there was no causal relation established between the Long Beach discharge and the Harbor pricing policy which commenced more than a year later (RUPF pp. 157–161; IV–113). Complaint counsel takes no contrary position, and we so find (compare CPF pp. 319–321).

9. *Harbor's Defenses to Pricing Charge*

89. Briefly, Harbor's position appears to be that (1) its pricing practices were reasonable and resulted from competitive bid-

ding, (2) it did not sell below the cost of the partnership to which it paid rent and the operating company treated as an entity, (3) sales were not in interstate commerce, and (4) its jobber competitors were not injured (see RHPF 7.27–7.173). We shall deal with the facts relating to these contentions *seriatim* in ensuing findings.

90. On the reasonableness of its pricing policy, Harbor makes several points. First, during the summer of 1966 there were, according to Fred Hooker (a McCann employee who was subsequently employed by respondent Harbor) high markups due to a poor spring season, and these markups were occurring at a time when chain stores, both self-ripeners and purchasers from jobbers, were aware of how high the markups were (Tr. 6441–6442). The chain-store purchasers were harassed by price advertisements of 10 cents a pound by Safeway Stores, one of the self-ripeners. These Safeway prices had a seriously adverse effect on jobbers selling to nonripening chain stores (RH 49; RHPF 7.37–7. 41C). One of the nonripening chains, Ralph's Grocery Company (Ralph's), questioned the McCann markups (Tr. 6442). It hired a management-consulting firm to study the feasibility of putting in banana-ripening rooms (RHX 5), and it requested its four suppliers to bid for its business on the basis of a fixed markup over seaboard cost. (Tr. 6442–6445).

The jobbers knew that Ralph's was having a feasibility study made (Tr. 6442–6443) and that was a cause for concern (Tr. 6046–6048). The jobbers also knew that other jobbers were being asked to bid. The bidding was not conclusive. Ralph's, for example, told both Harbor and Pacific Banana Company (Pacific) that their bids were high and permitted them to make adjustment. Also, Ralph's rejected McCann's bid of 50 cents presumably because it was conditioned on receiving 100 percent of Ralph's business (Tr. 6449), although McCann's price was lower than the price Ralph's first received from Harbor and Pacific (Tr. 6049–6050, Tr. 3416, 3421). Before Mr. Maligie agreed to bid 45 cents above seaboard (which he knew to be below his then cost (RHPF 7.65), Mr. Maligie checked his authority to do so with both Dr. D'Antoni and Harbor's counsel, John E. Scheifly, Esquire (Tr. 6052). Having accepted the modification of its original bid to Ralph's, Harbor then made that fixed markup price universal for all its customers (RHPF 7.58; Tr. 6058–6062). Its reasons for doing this were advice of counsel (RHPF 7.59) and because

Ralph's price made the market; moreover, higher prices could not be charged others as a matter of good business (see RHPF 7.58, 7.59). Mr. Maligie considered that having a fixed markup would enable the non-ripening chains to compete with self-ripening chains, would increase Harbor's volume, and would stop the nationwide drift toward more self-ripening chains (RHPF 7.62, 7.63, 7.78). Harbor definitely made the first move along this line in the Los Angeles area. It claimed that it had to go below its markup to meet the price competition of other jobbers (RHPF 7.88–7.89). Complaint counsel takes the position from examining Harbor's own charts (RHX 223a–f) that Harbor thereafter led some of the price cutting below the 45 cent proposed markup. In our opinion, this is of relatively little importance since concededly Harbor's initial price was below its cost. Nor is it significant that all jobbers increased their volume. That is merely a reflection of the law of supply and demand. The competition of the self-ripening stores was affected and their volume significantly diminished (RHPF 7.108). In light of this result, which was intended, the impact on the profits of the other competing jobbers was less significant.

91. With regard to the position that D & J Investment Company to which Harbor paid rent must be regarded as a single entity with Harbor, for the purpose of this proceeding, we do not so find. Clearly, Dr. D'Antoni and his advisors regarded the investment he and his family made in D & J Investment Company and Harbor Banana Distributors, Inc., as a single investment (Tr. 4853–5854, 5231; RHPF 7.150). However, on advice of counsel, the fixed assets were held by the partnership and leased to the corporation presumably for limited liability and tax purposes (Tr. 4853–4854; RHPF 7.150–7.151). Should we now disregard the corporate fiction it would be contrary to the plan to protect the fixed assets and to limit liability by the separation of the two functions. Hence we cannot measure Harbor's profits or losses by disregarding the rent paid that was no more than reasonable in the circumstances (8 percent return; see RHPF 7.148). We turn now to the contention that below-cost sales were not in interstate commerce.

92. There were a number of sales made to regular customers whose businesses were located outside the State of California. The invoices show that they were made below a price at which Harbor could recover its costs (CX 225a–232; CPF 3.179–3.195). Since a

number of out-of-state customers have buyers located at the downtown Los Angeles market (Tr. 1868–1872, 2150–2157), other jobbers have access to them also and there was some evidence of actual contemporaneous sales to out-of-state customers by Harbor and by another jobber (C. Reply Brief, pp. 45–46; CX 364–371). Hence Harbor's under-cost sales were in interstate commerce and in direct competition with another jobber also selling in interstate commerce. We consider now the question of jobber injury.

93. The matter of the effect of Harbor's pricing on competing jobbers was exhaustively examined during the hearings in Los Angeles and left us with the impression, on the basis of the examination and the skillful and careful cross-examination of the competing jobber witnesses, that their profits dropped to an appreciable extent during the period following the October 1966 fixed-price policy adopted by Harbor, but not to the extent that the unaudited figures and estimates might indicate (Tr. 2419–4484). As heretofore observed, however, the intended result of decreasing the business of the self-ripening chains concededly occurred and we need not belabor the alternative effect.

94. On the basis of the foregoing findings, we find that Harbor's fixed-price policy was adopted for the purpose and with the intent of increasing its efficiency and volume and decreasing the impact of the self-ripening chains. This policy was successful. The resulting sales were deliberately made below Harbor's cost for this two-fold purpose and some sales were regularly made in interstate commerce. We cannot disregard the corporate fiction and consider D & J Investment Company and respondent Harbor as a single entity. And, we find that the competing jobbers were injured to some extent by the Harbor pricing policy. We consider now the overcapacity charge.

10. *The Charge of Deliberately Creating Overcapacity*

95. It is the position of complaint counsel that the Harbor plant was planned to handle many more bananas than all the other jobbers combined and that its actual capacity is more than is necessary for its operation. Respondents assert that the actual capacity is reasonably necessary to support respondent Harbor's operations and much less than puffing statements suggest or competing jobbers estimate.

96. It is true that in the February 1964 correspondence preliminary to attempting to secure cooperation from United to create a waterfront processing plant, Norf Jebbia was discussing the construction of a plant with sufficient capacity to process over 100 carloads of bananas a week (CX 13b). It is also true that Norf Jebbia, just before ground breaking for the new plant in May 1964, was telling the trade in an announcement about processing 150,000 boxes a week and supplying bananas for 17 million people (CX 34b). And, bearing the date of the opening of the plant at Long Beach, a press release, which was found in Harbor's files, claims that the plant is the world's largest and can hold 80,000 boxes or 200 carloads of bananas, and was expected to handle 40,000 boxes each week (CX 209a-c). Respondent Harbor's general manager, Albert Maligie, disavowed the release and pointed out a number of errors (Tr. 1911–1923). Two captions attached to photographs (CX 210–212) also contained estimates that Mr. Maligie denied were correct (Tr. 1934–1938, 6221–6225). He claimed they were puffing to create interest and to discourage additional self-ripening by chains by convincing them that Harbor could handle their volume (see RUPF V–46; Tr. 1946–1947, 2330–2334).

97. The stipulated [18] testimony of Norman W. Eddles, an employee in United's customer service department and an expert on banana stacking and ripening procedures, that the practical capacity was 57,792 boxes and Mr. Maligie's testimony (Tr. 1902) that the maximum number of boxes simultaneously present was between 54,000 and 58,000 boxes appears to us to be more realistic, and we so find.

98. In the light of their cross-examination, we do not give weight to the offhand estimates made by Howard Lynn and other jobbers when they toured the Harbor facility on opening day (CPF 3.290; see RH Response pp. 91–92). Nor do we give weight to Mr. McCann's suggestion about dynamic capacity (CPF 3.292) in the light of the put-through statistics of his operation (URX 55) and his admissions on cross-examination (RUPF V–48, fn. to p. 223).

99. Because of the expanding population of the area in which Harbor was operating, even though the increase in population was not as great as anticipated, it was reasonable for the Jebbias

[18] It was stipulated that if called he would so testify (Tr. 4640–4641).

in 1964 to construct a plant capable of processing a little over twice as many bananas as they were currently purchasing, particularly since the plant was designed to handle either stems or boxes. It is not evidence of a monopolistic intent (see RUPF V–50; see CX 182b). Rather it is considered a reasonable action to attempt to stem the tide of self-ripening by chains that had gone on in other sections of the United States and that had commenced in southern California (see RUPF V–51). We turn now to an examination of the question of Harbor's inducing United to grant direct waterfront delivery.

11. *The Inducement for Direct Delivery Not Evidence of Monopolistic Intent*

100. We have previously determined that United's action in making direct delivery to Harbor's plant was a good-faith attempt to meet Standard's competition and thus that Harbor did not knowingly induce an unlawful discrimination (see Findings 38–52 [pp. 80–87], *supra*).

101. It does not follow, however, that the Jebbias' inducements may not have been a step in an attempt to monopolize or evidence of an intent to do so. However, on reviewing the testimony and particularly the contemporaneous exhibits, it seems very clear that respondent Harbor was even at the earliest stages of negotiations with United showing its concern that its business would be destroyed by the direct purchases of the self-ripening chains. The import of Thomas E. Sunderland's letter of July 30, 1962, summarizing for B. C. Tiffany the meeting of July 24 with the Jebbias (CX 3a-b), makes it very clear that the Jebbias were exceedingly concerned about the self-ripening chains and that Mr. Sunderland was attempting to assure them that "jobbers as efficient as he can do a better job ripening and processing bananas for chain stores than the stores can do themselves, and the jobber can do it cheaper" (CX 3b). At the same time, Mr. Sunderland took pains to explain United's position under the consent decree.

102. Similarly, in Norf Jebbia's letter to Mr. Fox dated January 27, 1964, Mr. Jebbia emphasizes again his concern about the self-ripening plans of the chains and seeks United's assistance in having them hold up their self-ripening operations until the Jebbias can demonstrate their efficiency of operation in a pro-

posed new facility (CX 13). These letters corroborate the testimony that the Jebbias' action was taken to prevent the loss of their business. It was not a step in or evidence of an intent to monopolize, it was intended to maintain the jobber's position in the industry. We turn now to the purchase of the McCann assets.

12. *The McCann Asset Purchase Not Evidence of Monopolistic Intent*

103. As we point out in subsequent findings, the McCann asset purchase was in violation of Section 7 of the Clayton Act. That fact, however, does not indicate that it was an act of attempted monopoly or evidence of an intent to monopolize.

104. None of the witnesses who testified and none of the exhibits received in evidence show any sound indication that the purpose of Harbor in buying the McCann assets was an attempt to create a monopoly. To the contrary, Harbor was seeking the plant to obtain better access to the downtown market area (RHPF 8.5; Tr. 5272). And, it was expressly stated in the agreement of purchase that Mr. McCann was not restricted from going into the business again (RHX 4a-k).

105. Under these circumstances, we do not find that the purchase of the McCann assets was a step in an attempted monopolization or an intent to monopolize. We pass now to a consideration of the facts concerning the McCann asset purchase as it is applicable to the charge under amended Section 7 of the Clayton Act.

H. *The McCann Asset Purchase (Count IV, Sec. 7)*

106. Regarding the charge in Count IV of the complaint, that respondent Harbor purchased the assets of the Charles C. McCann Company in violation of Section 7 of the amended Clayton Act, no claim is made against respondent United and no issue is raised by respondent Harbor about the purchase having been made. Accordingly, we find that respondent Harbor purchased substantially all the physical assets of Charles C. McCann Company and Tradewinds Produce, Inc., in February 1968 (C.A.).

Harbor claims that: (a) it acquired only the physical assets of a seller that was no longer a competitive factor and that was unable to dispose of its assets elsewhere; (b) the seller retained other assets and the right to compete; and (c) the acquisition

had no anticompetitive or monopolistic effect. We now consider the agreement, the competitive background, and respondent Harbor's defenses.

1. *The Agreement of Purchase*

107. By formal agreement, dated February 2, 1968, respondent Harbor agreed to purchase certain physical assets of Charles C. McCann Company and Tradewinds Produce, Inc., two California corporations, collectively described as the seller in the agreement, and herein as "McCann." The purchase price was $150,000. The assets consisted of specified motor vehicles; other tangible property, including refrigerating and control equipment, scales, trucks, and office equipment; and the seller's interest in certain leases (RHX 4a-k). It was expressly agreed that the agreement would not preclude Charles C. McCann, the sole stockholder of both corporations from engaging in any phase of the banana business in the future (RHX 4e). The trade name, goodwill, and accounts receivable were retained by Mr. McCann (RHPF 8.22, 8.23; Tr. 2200). Within a few days after the execution of the agreement, Harbor was operating out of what had been the McCann facilities. Illustrative of the immediacy, Harbor bought from McCann the bananas it had on hand at the time of the sale and proceeded to sell them (Tr. 2007–2008).

2. *The Acquired Company*

108. McCann itself had been the result of two acquisitions. In September of 1961, McCann had acquired the Consolidated Banana Division of the Consolidated Fruit Produce Company (Tr. 4242–4244). In October of 1965, McCann had purchased the W. W. Crenshaw Company, which was a wholesale banana jobber in the Los Angeles downtown market (Tr. 3701–3703). W. W. Crenshaw Company was operated by Mr. McCann under the preexisting corporate charter of Tradewinds Produce, Inc. (Tr. 3704).

According to its unaudited statement, the Charles C. McCann Company had a net worth of $238,205.84 and total assets of $315,448.50 as of February 3, 1968 (CX 362Z–32). Tradewinds Produce, Inc., from a similar statement had as of the same date a net worth of $45,465.56 and total assets of $82,884.96 (CX 363Z–33).

109. Prior to its acquisition, McCann had been the second largest of the wholesale banana jobbers in the Los Angeles market and Harbor's major competitor (CX 408a and b; CPF Appendices E and F, CPF 4.6).

110. During the period preceding the acquisition, McCann was operating at a profit (CPF 4.7).

111. McCann was operating its banana jobbing business every day until the acquisition was consummated (Tr. 3961). In the one month and one day of 1968 before the acquisition, McCann-Crenshaw purchased 141,219 boxes of bananas having a purchase price of $350,324 (URX 55e). At the time of the acquisition, McCann had the best available space in the market (Tr. 2017; CPF 4.8).

112. Subsequent to the sale of the assets of McCann, Mr. McCann, the sole stockholder, no longer engaged in the banana business (Tr. 3972), and both the Charles C. McCann Company and Tradewinds Produce, Inc., were dissolved (CX 374g–1, 375g-k; CPF 4.9, 4.10).

113. Mr. Maligie testified that he believed "we" were concerned about another ripener purchasing the McCann plant—one chain in particular who was one of Harbor's customers (Tr. 2015).

When asked about another jobber, he testified that anyone could have acquired it. He denied, however, that that was the principal reason. The "main" purpose was the "location." He added, "And we were then, and still are, concerned about chain stores, any chain store could have gotten it, that we were selling * * * " (Tr. 2016).

3. *Both Participants Were Engaged in Commerce*

114. As we have already found (Finding 6 and 32 [pp. 70, 78], *supra*), respondent Harbor is engaged in commerce as defined in amended Section 7 of the Clayton Act.

115. Similarly, McCann is engaged in both interstate and foreign commerce. Like Harbor, McCann's advance purchases from United and Standard were made in commerce, and the bananas it purchased remained in the flow of commerce. In addition, it regularly sold to some customers located outside the State of California (*e.g.* CX 364–371; see CPF 4.24, 4.25).

4. *The Relevant Market*

116. We have already considered what constituted the relevant market and who the participants were under findings relating to the attempt to monopolize charge (Findings 55–85 [pp. 88–96], *supra*). We reiterate those findings here.

5. *Market Shares of Participants*

117. The last full year before the merger, 1967, considering the participants to be as we have heretofore found them (Findings 82–85 [pp. 95–96], *supra*), Harbor possessed 40.5 percent of the relevant market in dollar volume of purchases from importers, and McCann 24.4 percent (CPF 4.11; Appendix E) or 36.5 percent and 27.4 percent, respectively, measured in boxes purchased (CPF Appendix D).

118. Even if we include the three self-ripening chains and Coast Citrus—the only jobbers of significance outside of what we have determined to be the relevant geographic market—in 1967 Harbor had 27.1 percent of the dollar volume, and McCann 15.1 percent, or 26.9 percent and 15.0 percent, respectively, of the purchase volume measured by boxes (RH Response p. 107).

119. Thus, even on Harbor's assumption, which we do not accept, that the self-ripening chains and the only significant outlying jobber should be included, the combined shares of Harbor and McCann the last full year before the February purchase amounted to 42.2 percent of the dollar volume and 41.9 percent of the boxes sold to the nine largest banana ripeners located in the nine southernmost counties of California, who constituted 87.5 percent of the direct purchasers from importers.

6. *Probable Effect on Competition*

120. Realistically, the combined 1967 market shares of Harbor and McCann measured by dollar volume of purchase was 64.9 percent and by boxes purchased was 63.9 percent in the area of competition (Findings 82–85, 117 [pp. 95–96, 106] *supra*). Thus, almost two-thirds of the potential purchasing power of banana jobbers was concentrated in the hands of the resulting entity, and the intense competition that had previously existed between McCann and Harbor (see Tr. 1779) in the purchasing and selling of bananas was completely destroyed.

121. Moreover, the pre-existing concentration in the big four (86.1 percent; see CPF 4.32; Appendix E) was reduced to the big three with the two jobbers other than Harbor, Pacific Banana Company and Growers Marketing Company providing less than 16 percent and 10 percent, respectively (CPF Appendix G, 4.32). The combined share of these three amounted to 85.9 percent (CPF 4.32).

122. Harbor increased its potential capacity of about 58,000 boxes (Finding 97 [p. 101], *supra*) by 17,000 to 18,000 boxes (Tr. 3976–3977; CPF 4.27) and secured an excellent outlet stall in the marketplace.

123. By reason of the foregoing, we find that the effect of the purchase of the McCann assets may be substantially to lessen competition or to tend to create a monopoly (Findings 116–122 [pp. 106–07], *supra*). We turn now to respondent Harbor's affirmative defenses.

7. *Harbor's Affirmative Defenses to the Alleged Illegality of the Purchase*

124. We have already found that the purchase agreement covered only physical assets of McCann (Finding 107 [p. 104], *supra*) and that Mr. McCann retained the right to compete, the use of the trade name and goodwill, and the accounts receivable. We do not, however, find that McCann was no longer a competitive factor prior to the purchase nor that the assets could not be disposed of elsewhere. As early as 1964, Mr. Charles C. McCann had considered selling his business to his accountant and to Mr. Hooker, his manager (Tr. 6459–6460). He also tried to interest Mr. Maligie (Tr. 6132–6134). Mr. McCann had been in ill health, was past the usual retirement age, and was concerned about what would happen to his wife on his death if the business was not sold (Tr. 1995–1996, 4361–4364, 6461–6462; RHPF 8.24, 8.25). He had also considered selling to Thrifti-Mart, a chain store (Tr. 6460–6461). However, there was no proof that he made a concerted effort to sell. The business could well have been continued under Fred Hooker's management. Mr. Hooker was hired by Harbor for that purpose and he continued to make the decisions for Wholesale Banana Distributors, Incorporated (the new name given to the McCann facility by Harbor (Tr. 2202–2203)) except those decisions involving pricing,

purchasing, and personnel (Tr. 2009–2012). At one time, the negotiations broke down between Harbor and McCann because Mr. McCann refused to take the time to have the purchase cleared by the Federal Trade Commission (RHPF 8.19; Tr. 3961). And, the extensive purchases made in January indicate that the firm was by no means a failing company nor was it going to be discontinued as a business if the purchase negotiations fell through (Finding 111 [p. 105], *supra*).

125. Harbor's claim that there was no anticompetitive effect appears primarily to be based on the assumptions that: (1) bananas are not a relevant product market (RHPF 8.33) and (2) all jobbers, in the long run, benefited from the disappearance of McCann because by 1969 all independent jobbers, with the exception of one, showed some increase in their percentage of the market (RHPF 8.38, 8.47–8.48). Neither of these assumptions constitutes a defense. As we have already found (Findings 56–69 [pp. 88–92], *supra*), bananas must be regarded as a sepapate product market, and the *probable* effect is the test laid down in the statute. The probable effect, viewed as of the time of the acquisition, was clearly anticompetitive (Findings 118–121 [pp. 106–07], *supra*).

126. Accordingly, we find that Harbor's affirmative defenses are not adequate to change our findings that the purchase of the McCann physical assets by Harbor was between companies both of which are in commerce, and that its effect may be substantially to lessen competition in the line of commerce of the wholesale distribution of bananas and in the section of the country embraced in the counties of Orange and Los Angeles, California (Findings 106–121 [pp. 103–07], *supra*).

## III. REASONS FOR DECISION [19]

The undersigned has carefully examined the pleadings, prehearing proceedings, and the more than eleven hundred pages of proposed findings, conclusions, briefs and responses of the parties, as well as the transcript and exhibits received in evidence. On the basis of all of these, we have reached the conclusion that the charge against respondent United was solely based on its activity in connection with diverting a ship to unload directly into respondent Harbor's plant at the waterfront in Long Beach,

[19] This section is included pursuant to 5 U.S.C. Sec. 557 C 3A, requiring that findings and conclusions, and the reasons or basis therefor be included in the decision.

at a time when it was selling other Los Angeles customers at Wilmington. It seemed very clear that this was a discrimination in favor of respondent Harbor and thus in violation of Section 2(a) of the Clayton Act, as amended,[20] unless justified. We found, however, that United was justified on the basis of the testimony of its officials and former officials who convincingly demonstrated that Standard Fruit and Steamship Company (Standard) was capable of taking away and might well have taken away the business, or a large portion of it, from United unless United met Standard's competition.[21] This testimony was supported by pertinent contemporary records. Thus, so far as Count I of the complaint is concerned, we find that it failed because of the successful defense under Section 2(b) of the amended Clayton Act.[22] Under this circumstance, the statistical struggle between the parties becomes academic and we find it completely unnecessary to make detailed findings on the cost to United or on the effect of Harbor's unsatisfactory location. But this does not completely dispose of United because it is also charged under Count III with aiding and abetting respondent Harbor's alleged attempt to monopolize.

The attempt to monopolize charge, unlike monopoly itself, carries with it an obligation on the part of complaint counsel to establish that both the party charged with attempting to create a monopoly and the party charged with aiding such an attempt intended to create or to aid in the creation of a monopoly.[23]

In the background of this industry in California, intent on the part of United was entirely implausible. United's officials were very clear that not only did they not intend to assist in creating a monopoly but that it would be contrary to United's interest to have Harbor become a monopoly. United's reluctance to meet fully all of the services Standard supplied to Harbor and United's demonstrated concern for the other jobbers (found in the contemporary documents) lends further support to our conclusion that United should not be held under Count III either. Hence,

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[20] Quoted in fn. 2 [p. 64], *supra*.

[21] We recognize that some of Harbor's customers had insisted on United's bananas so that Standard would not have gotten all of Harbor's business; but obviously, Standard was in competition, and as eventuated in 1969, it got a large proportion of the business when United ceased direct delivery.

[22] See fn. 6, page 4 [p. 65], *supra*.

[23] *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *Times Picayune Pub. Co.* v. *United States*, 345 U.S. 594, 626 (1953); *Golden Grain Macaroni Co.*, Docket 8737 (FTC January 18, 1971) (Opinion, at 13, fn. 10 [78 F.T.C. 63, 164]); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D.C. Mass. 1953) *aff'd.*, 347 U.S. 521 (1954).

the case will be dismissed as to respondent United. We turn now to respondent Harbor.

Harbor was charged under three counts: (1) illegally inducing a discrimination under Section 2(f) of the Clayton Act, as amended; (2) attempting to create a monopoly by specified activity that included: inducing discriminatory prices, manipulating prices, creating over-capacity and purchasing a competitor; (3) acquiring its largest jobber competitor in violation of Section 7 of the Clayton Act. We discuss these charges in order.

The alleged illegal inducement of discrimination by Harbor under Count II, Section 2(f) of the Clayton Act, as amended, as we view it, is that the language of the statute itself precludes liability because the discrimination induced must be one prohibited by Section 2(a), (c), (d), or (e) of said Act, and as we have found, United's discriminatory activity was taken in good faith to meet the competition of Standard Fruit and Steamship Company. Thus, there cannot be liability for the inducement under Section 2(f) because the discrimination by United was fully justified by the proof of meeting Standard's competition. Accordingly, Count II must be dismissed as to Harbor.

The alleged monopolization charge and the acts specified thereunder are in a different posture. While it is arguable that the language of the complaint [24] might be tortured into a charge that each of the allegations of the means used to attempt the monopoly was itself an unfair act or practice under Section 5 of the Federal Trade Commission Act, we take the position that the thrust of the charge under Count III is the attempted monopolization. The proceeding was tried on that basis, and no attempt was made to amend the complaint to charge that each of the separate activities was a violation of Section 5 without regard to such allegations constituting an attempt to monopolize. Two of the four activities only were set out in separate counts.

Hence, under the controlling decisions [25] an attempt to consti-

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[24] Paragraph 15 of the complaint reads as follows:

PARAGRAPH FIFTEEN: Each of the acts and practices of respondent Harbor alleged in this Count separately and in combination with each, any, or all of the other acts and practices alleged in this Count have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; have been conducted, engaged in, and adopted, for the purpose of creating monopoly in respondent Harbor; are all to the prejudice of the public and to competitors of respondent Harbor; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

[25] See fn. 23, p. 51 [p. 109], *supra*.

tute an offense requires a demonstration that there was a specific intent on the part of Harbor to monopolize. With this in mind, we have found that respondent Harbor did not have the specific intent required. The contemporaneous documents as well as the testimony of the witnesses called by the government demonstrate that the purpose of the Jebbias and of Harbor was by increasing efficiency to prevent the chain stores from engaging in the self-ripening of bananas, bypassing the banana jobbers entirely. The statistics as well as the testimony demonstrate that there was a trend towards elimination of jobbers throughout the United States. Accordingly, the Jebbias' and their successors' fear was well founded that this trend, which had not yet engulfed the West Coast, would soon, after the advent of the tropical boxing-program, do so. Their purpose, motive, and intent was to stay alive, and each of their activities was consistent with this motivation.[26] We first turn to pricing.

Admittedly, Harbor knowingly sold below cost when it adopted a 45-cent price above the seaboard price as its price overall. Technically, it did not reach this price as a result of competitive bidding. And, technically, its reason was not to meet competition but to meet the threat that Ralph's Grocery Company would adopt self-ripening and bypass the jobber ripeners completely. Whatever might have been its liability under a simple charge of selling at unreasonably low prices, the proof failed to establish that the price fixed was fixed with an intent to monopolize. It was a purely defensive measure to maintain the channel of jobber distribution.

In like manner, the contemporaneous documents show that the Jebbias' and their successor Harbor's desire in building the waterfront plant was to become so efficient and to have a capacity

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[26] We have carefully considered complaint counsel's lucid and persuasive argument appearing at pages 1–5 of their Response filed September 20, 1971, on the subject of market power. We agree that Harbor intended throughout to become so efficient that the retail chains would have no cause to bypass the wholesaler ripeners and engage in self-ripening. We also agree that Harbor was almost entirely successful in that endeavor and that as a consequence the chain-store direct purchases failed to increase. Harbor also when faced with added expense later raised its price. However, we do not regard this intent of Harbor to be any more than a desire for self-preservation. Faced with the competition of the very much larger retail chain organizations, who had ample resources to engage in self-ripening if the jobber price was not right, the relatively small business of Harbor had little choice. Moreover, it was not established that there were any serious barriers to the entry on self-ripening by the chains (compare p. 49 of the complaint counsel's Response). Hence, we do not regard Harbor's intention as an intent to monopolize at all. To construe it as such would be to fly in the face of the standard of interpretation, emphasizing the protection of small business, laid down by the Supreme Court in *Brown Shoe, supra.*

sufficiently adequate so as to allow them to handle the volume of the burgeoning chain stores so that the chain stores would not be motivated to bypass Harbor and engage in self-ripening. Accordingly, we do not regard Harbor's action as evidence of an intent to monopolize. Moreover, the capacity of the plant under the circumstances in which it was built does not appear to us to be so great as to demonstrate more than a prudent regard for the potentialities of increase in population in the fast growing southern California area served. This is particularly true when one must consider that at the time the plant was planned the Jebbias could not be certain whether stems or boxes would be imported. So, they prudently made provisions for both.

The desired efficiency was also the motivating force for the location at waterfront, and for the arrangements with Standard for direct-from-boat delivery.

The inducements the Jebbias and their successor Harbor made show no more than an attempt to fully exploit their desire for efficiency by also securing direct-from-boat delivery from United. This is not evidence of a specific intent to monopolize.

Once more in considering the purchase of the McCann assets, the evidence is uncontradicted that the efficiency and the attempt to forestall chain-store self-ripening were the motivating factors. Harbor needed stall space in the market area to replace its inefficient downtown facilities. Its purchase of McCann's assets is thus not evidence of a specific intent to monopolize since it too falls short of the demonstration required; although, as later discussed, the purchase runs afoul of the antimerger provisions of amended Section 7 of the Clayton Act.[27]

As we see it, none of the foregoing acts charged were in themselves evidence of the specific intent required. Mindful of the doctrine of Alcoa[28] we have also considered the impact of the total of all the acts charged, but we have reached no different conclusion. The acts, taken together, are consistent with the claimed motivation of preserving the ripening business of jobbers against the threat of withdrawal of the chain-store business through self-ripening and creating greater efficiency as a means to that end. Thus, Count III must be dismissed. This leads us to a consideration of the legality of the McCann asset purchase under amended Section 7 of the Clayton Act.

[27] See fn. 5, p. 3 [p. 64], *supra*.

[28] *United States* v. *Alcoa*, 148 F.2d 416, (2nd Cir. 1942).

Quite unlike the requirement of a specific intent in the attempt to monopolize (Count III), under amended Section 7 of the Clayton Act (Count IV), the *potential* effect of the asset purchase is the key. Provided that the requirements of commerce are met, the principal question is what is the probable effect on competition in any line of commerce in any section of the country? [29] In this instance, there was no question concerning the fact of the purchase of substantially all of the physical assets of McCann by respondent Harbor, and very little question about the fact that both Harbor and McCann were engaged in commerce; although, respondent Harbor did attempt to minimize the extent of commerce. The serious infighting revolved around the definition of "line of commerce" and "section of the country," and in the recognition of the statistical position of Harbor in the competitive setting.

Complaint counsel in their case-in-chief rather assumed that the product line was the banana because of its unique physical characteristics, its source, and its special requirements for ripening before sale.

Respondent Harbor, however, attempted to demonstrate through the use of a report by Dr. Henry B. Arthur, a distinguished professor emeritus from Harvard Business School, that the product was really all fruit and melons. We were not convinced either by his statistics or by his attempts to draw a line that the enlargement of the product market was justified, particularly in light of the recent decisions on the subject.[30]

Similarly, in connection with the geographic market, complaint counsel drew the line and based their statistics on the testimony of the practical men in the industry who stated what their competition was and on a statement by Mr. Maligie obtained during the investigation. While, admittedly, there was some slip over across the boundaries proposed by complaint counsel, the contention of respondents that this was sufficiently significant to

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[29] See *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967).

[30] *Reynolds Metals Co.* v. *FTC* 309 F.2d 223, 236 (D.C. Cir. 1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *United States* v. *Alcoa*, 377 U.S. 271, 277 (1964); *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966); *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 369 F.2d 449, 456–457 (9th Cir. 1966) *cert. denied*, 387 U.S. 932 (1967), *rev'd on other grounds after retrial* 389 U.S. 384 (1967), *rehearing denied*, 390 U.S. 930 (1968); *General Foods Corp.* v. *FTC*, 386 F.2d 936, 940 (3rd Cir. 1967), *cert. denied*, 391 U.S. 919 (1969); *Columbia Broadcasting System and Columbia Record Club* v. *FTC*, 414 F.2d 974, 979 (7th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); *Balfour Co.* v. *FTC*, 442 F.2d 1, 10 (7th Cir. 1971); *Kennecott Copper Corp.*, Docket 8765 (FTC, May 5, 1971 [78 F.T.C. 744]).

enlarge the boundaries completely lost sight of the very practical limit placed on price competition by the distances to be traveled and the truck costs involved in the enlarged area proposed by respondents. We opt for the practical judgment of the jobbers in the market as to where their principal competition arose, particularly since the extent of the geographic market cannot be precisely delineated.[31] And, we find that Dr. Arthur's conclusions were not sustained by the more recent decisions.

In like manner, with regard to the participants in the market, it is our position that the self-ripening chains, while they clearly must be taken into consideration, are not part of the "line of commerce." We regard as the line of commerce the wholesale distribution of bananas, and the participants, the jobber-ripeners. Dr. Arthur would have us include self-ripening chains and produce handlers as well. This, in our opinion, comes too close to the proposition that all products compete for the customer's dollar. We accordingly take the position that the line of commerce should be limited to those banana jobbers within the area of practical competition as defined by the active participants in the business.

Once the market is so delineated, it is quite clear that the asset purchase of McCann would, viewed at the time it was made, necessarily substantially lessen competition. Clearly it was a horizontal merger involving active competitors. The combined purchases[32] of Harbor and McCann were 64.9 percent of the dollar volume of purchases of jobbers, and when the purchase of McCann was consummated, concentration increased so that the first three jobbers—Harbor, Growers, and Pacific—then purchased over 88 percent of the bananas sold to all jobbers in the Los Angeles area.

Even under Harbor's assumption, which we consider erroneous, that the purchases of self-ripeners and jobbers in the 9 southernmost counties of California, who make 87 percent of the purchases of bananas from the importers, should be included, Harbor's and McCann's combined share would amount to between 41 percent and 43 percent. Clearly such a concentration would create a serious potential toward substantially lessening competition.

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[31] *Crown Zellerbach* v. *FTC*, 296 F.2d 800 (9th Cir. 1961), *cert. denied*, 370 U.S. 937; *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962).

[32] We utilize the purchase figures as they are the only figures regarded by all parties as complete and accurate.

We accordingly find that the McCann asset purchase violated amended Section 7 of the Clayton Act and that a customary dissolution order should be issued. We consider now our conclusions of law and proposed order.

## IV. CONCLUSIONS OF LAW

1. The respondents are engaged in commerce and the transactions that are the subject matter of this proceeding were in the course and conduct of such commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act. Accordingly, the Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents.

2. Respondent United has discriminated in favor of respondent Harbor in the sale of bananas in contemporaneous sales to respondent Harbor and to other customers competing with Harbor in the resale of such bananas by the institution and maintenance of a dockside discharge from its seagoing vessels directly into respondent Harbor's plant at Long Beach.

3. The bananas which were sold to respondent Harbor and to respondent United's other customers who competed with Harbor were of like grade and quality and were sold for use, consumption, and resale within the United States.

4. Respondent United's action in instituting and maintaining such discharge was a reasonable, good-faith effort by United to meet the competition of its chief competitor, Standard Fruit and Steamship Company, within the meaning of the amended Section 2(b) of the Clayton Act. Accordingly, the charge contained in Count I of the complaint should be dismissed.

5. Since respondent United's action was not a discrimination that violated the amended Section 2 of the Clayton Act, respondent Harbor could not have knowingly induced or received a discrimination prohibited by the Act in violation of Section 2(f) of the Act. Accordingly, the charge contained in Count II of the complaint should be dismissed.

6. The evidence failed to establish either that respondent Harbor took the actions charged in Count III with the specific intent of attempting to create a monopoly or that respondent United aided and abetted Harbor's alleged attempt with the specific intent of aiding it to attempt to create a monopoly. Accordingly, the charge contained in Count III of the complaint should be dismissed.

7. Respondent Harbor is a corporation organized and doing business under the laws of the State of California. On February 2, 1968, respondent Harbor acquired substantially all of the physical assets of Charles C. McCann Company and Tradewinds Produce, Inc., each of which was a corporation organized and doing business under the laws of the State of California. They are hereinafter described as the acquired companies.

8. Respondent Harbor and the acquired companies were each engaged in commerce, as "commerce" is defined in the Clayton Act. Accordingly, the Federal Trade Commission has jurisdiction over the acquisitions of the assets of the acquired companies.

9. The business of purchasing bananas from importers, ripening them, and then selling them to retailers is a line of commerce within the meaning of amended Section 7 of the Clayton Act in which both respondent Harbor and the acquired companies were engaged.

10. The Counties of Los Angeles and Orange in the State of California are a section of the country within the meaning of Section 7 of the Clayton Act in which both respondent Harbor and the acquired companies were engaged in business.

11. The effect of the acquisition by respondent Harbor of the acquired companies may be substantially to lessen competition among Harbor and its competitors and to tend to create a monopoly in the line of commerce in which Harbor is engaged in the area of Los Angeles and Orange Counties, California.

12. The acquisitions were in violation of Section 7 of the amended Clayton Act.

13. This proceeding is in the public interest.

14. The following order should issue:

ORDER

I.

*It is ordered,* That:

1. The complaint be dismissed as against respondent United Fruit Company and its successor United Brands Company and against United Fruit Sales Corporation now denominated Chiquita Brands, Inc.

2. Counts II and III of the complaint be dismissed as against respondent Harbor Banana Distributors, Inc.

II.

*It is further ordered,* That:

1. Respondent Harbor Banana Distributors, Inc., a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors, and assigns, within six (6) months from the date of service upon it of this order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, and machinery acquired by Harbor Banana Distributors, Inc., as a result of its acquisition of the Charles C. McCann Company, and Tradewinds Produce, Inc., together with the goodwill created by the use of such assets, and all additions and improvements thereto, of whatever description, so as to restore that which formerly made up the Charles C. McCann Company, and Tradewinds Produce, Inc., as a viable competitive entity in the business of processing, selling and distributing bananas.

2. None of the assets, properties, rights or privileges, described in Paragraph II, 1., of this order, shall be divested, directly or indirectly, to any person who is, at the time of the divestiture, an officer, director, employee, or agent, or under the control or direction of, respondent Harbor Banana Distributors, Inc., or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Harbor Banana Distributors, Inc.

3. Pending divestiture, respondent Harbor Banana Distributors, Inc., shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the companies to be divested that may impair their present capacity or market value, unless such capacity or value is restored prior to divestiture.

III.

*It is further ordered,* That respondent Harbor Banana Distributors, Inc., shall not acquire, directly or indirectly, through subsidiaries, joint ventures, or otherwise, without the prior approval

of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any concern engaged in the processing, sale, or distribution of bananas.

IV.

*It is further ordered,* That respondent Harbor Banana Distributors, Inc., shall forthwith distribute a copy of this order to each of its operating divisions.

V.

*It is further ordered,* That respondent Harbor Banana Distributors, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate organization, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

APPENDIX A

Complaint counsel in their proposed findings limited their consideration of United's 2(b) defense to what they regarded as rebuttal (CPF note p. 128). In such rebuttal we are asked to find that we should not regard United's action in making direct delivery to Harbor to meet a physical condition that Standard had set up as meeting competition because: (1) Standard's quality was below that of United's; (2) Standard's price was lower; (3) certain customers insisted on United's bananas; (4) United's trademark gave United's bananas greater acceptance at retail so that they were there sold at a premium; and (5) United originally had a monopoly (CPF 1.123–1.197).

While we do not regard any of these factors as controlling, we make the following factual determination since there seems to be a dispute concerning them and since counsel may find it desirable to consider them.

1. For some portions of the year, principally in the summers, during the period 1960–1966, concededly the quality of Standard's bananas was less than the quality of United's, but for the remainder of the year, Standard's bananas were of comparable

quality (Tr. 2471–2472, 4540–4541, 2264–2269, 2399–2401, 2411–2414).

2. Standard generally sold its bananas at a price differential below United's prices during the relevant period (Tr. 4506). The differential was fixed at a point to make Standard's bananas competitive with United's bananas (Tr. 4541–4543, 2270–2271); although, it was regarded as a bargain price by the West Coast managers of Standard (Tr. 4543–4546, 4550, 2269–2272, 2415–2417).

3. Some retail store customers insisted on purchasing United's bananas and to this extent, as Mr. Maligie, Harbor's general manager, pointed out, they would not have been as successful if Harbor bought and sold only Standard's bananas (Tr. 2114–2115). This does not, however, indicate that the Standard bananas were not competitive, for the direct purchasing retailers Safeway, Von's, Alpha Beta, and Mayfair Markets purchased a very large proportion of their bananas from Standard (URX 55). The 10 cents a pound advertising campaign featuring such bananas caused much complaining by retail store purchasers of United's bananas from the jobbers. And starting from zero on the West Coast, Standard had been remarkably effective in selling its bananas since 1960.

4. United had a trademark program, but it was not started in California until later than in the rest of the country, and acceptance is a long drawn out process (Tr. 5092). It was United's aim to get a retail differential based on the merits and acceptance of its product, and its annual statements indicated generally that it had done so (CX 175 p. 6, CX 176 p. 5, CX 177 I–7, CX 178 p. 6). The aim was to get a 2 cent price differential (Tr. 5085–5086, 5093), but the differential in southern California was not reached and we find that Standard and United bananas were selling in southern California on occasion at the same price at retail and from the same bin (Tr. 4515–4516, 2276–2277, 5990–5991).

5. As we have previously observed, United had all of the business in 1960 before Standard decided to ship directly to the West Coast but that did not prevent Standard from getting the business of Safeway in California and from selling very substantial amounts to other ripeners and jobbers by 1965 (URX 55). Hence, we cannot conclude that there was not real competition between

the importers Standard and United, nor do we find that the Jebbias' threat to switch to Standard was an idle one (Tr. 5080). The Jebbias were already purchasing large amounts of bananas from Standard and presumably selling them (URX 55). They had seen fit to build their plant adjacent to Standard's wharf, and while they utilized a trucking firm for labor-cost economy more often than using the conveyor belt, they could have used the conveyor economically if they had purchased a larger volume from Standard (see CPF note, p. 157). And, the presence of the Standard conveyor remained a constant threat (Tr. 5129).

## OPINION OF THE COMMISSION

BY JONES, *Commissioner:*

Complaint in this case, filed on August 1, 1969, charges respondents United Fruit Company and Harbor Banana Distributors, Inc., with violations of Section 5 of the Federal Trade Commission Act, Sections 2(a) and (f) of the Robinson-Patman Act and Section 7 of the Clayton Act.[1]

Count I alleges that United violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, in giving discriminatory price advantages to Harbor in its purchase of bananas from United which did not give to its other customers who competed with Harbor.

Count II of the complaint alleges that Harbor violated Section 2(f) of the amended Clayton Act by inducing United to give it these discriminatory price advantages, when Harbor knew or should have known that such discriminatory benefits would not be granted to its competitors purchasing from United.

Count III of the complaint charges Harbor with having violated Section 5 of the Federal Trade Commission Act by selling bananas at unreasonably low prices, developing an excessively

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[1] The following abbreviations will be used for citations:

I.D. —Initial decision of Hearing Examiner
Tr. —Transcript of testimony
CX —Commission Exhibit
URX —Respondent United Exhibit
RHX —Respondent Harbor Exhibit
A. Br. Brief on Appeal of respondent United (U.), Harbor (H.) or complaint counsel (C.C.)
Ans. Br.—Answering brief
Rep. Br.—Reply brief

large plant capacity, inducing discriminatory terms in the purchase of bananas, and acquiring the business and assets of its largest competitor. Count III also charges Harbor with attempting to monopolize the sale and distribution of bananas in the Los Angeles area through these and other practices. United is also charged under Count III with violation of Section 5 by knowingly and materially aiding and abetting respondent Harbor in its attempt to monopolize the Los Angeles banana market.

Count IV of the complaint charges Harbor with having violated Section 7 of the Clayton Act, by unlawfully acquiring the assets of its largest competitor.

Hearings began on April 12, 1971 and continued with brief recesses until July 2, 1971. The hearing examiner issued his initial decision on November 18, 1971 and appeals from his decision were argued before the full Commission on March 8, 1972.

With respect to Count I, the hearing examiner found that United had discriminated in favor of Harbor in the sale of bananas in the Los Angeles market area, that the discrimination had caused competitive injury, but that the violation of Section 2(a) was not made out because of his conclusion that United had established a good-faith meeting of competition defense under Section 2(b) of the amended Clayton Act. Because of his conclusion that United's action was not an actionable discrimination that violated Section 2 of the amended Clayton Act, the examiner dismissed the Count II charge against respondent Harbor although he concluded that Harbor had "clearly * * * induced the activity of United." (I.D. F. 52 [p. 86 herein])

The hearing examiner dismissed Count III as to both Harbor and United on the ground that the complaint did not charge the alleged activities as separate unfair acts of competition and on the further ground that the proof failed to establish any intent on the part of Harbor to engage in these activities as part of an attempt to monopolize. He found the merger challenged under Count IV to be in violation of Section 7 of the Clayton Act and issued a cease and desist order consistent with this finding.

Both respondents United and Harbor, as well as complaint counsel, have filed cross appeals from the findings and conclusions of the hearing examiner.

The issues raised on these cross appeals encompass virtually every facet of this case. In order to understand their significance and make a determination as to their validity, it is essential to

summarize the facts respecting the import and sale of bananas into the Los Angeles market during the 1960–1969 period spanned by the complaint and the events which took place during that period which gave rise to the discrimination and intent to monopolize charges involved in this complaint.

II

## 1. The United States Banana Industry

Virtually all bananas consumed in the United States are produced in the tropical regions of the Western Hemisphere and are imported while still green into the United States. Immediately after importation, bananas are subjected to a specialized ripening process and thereafter marketed by the processors.

Prior to 1960, bananas were imported into the United States on the stem, hung by the processors on hooks until they ripened and thereafter cut down and boxed in customer-sized units for sale to the retail trade. After the mid-1960's, bananas were no longer imported into the United States on the stem, thus making it unnecessary for banana processors to cut and box the bananas after import. The already boxed bananas were simply placed by the processors in air-tight refrigerated rooms and ripened through the introduction of ethylene gas.

## 2. The Banana Industry in the Los Angeles Market

Prior to 1960, respondent United Fruit Company was the sole importer of bananas into the Los Angeles market.[2] United sold to both banana jobbers and to direct buying retail chains in the Los Angeles market. Throughout the period from 1960 through 1969, United continued to dominate the Los Angeles banana market, never supplying less than 75 percent of the needs of the banana jobber market as defined in this case. (URX 55)

In 1960, Standard Fruit and Steamship Company ("Standard") began importing into this market and by the end of 1964 had acquired approximately 36 percent of the import market. (URX

[2] In 1969, respondent United Fruit Company merged with AMK Corporation. United Fruit emerged as the surviving corporation, was renamed the United Brands Company, and became a division of the United Brands Company, called the United Fruit Company Division. After the AMK-United Fruit Company merger, United Fruit Sales Corporation became a unit of the United Brands Company and remained as the sales arm of the United Fruit Company, operating under the name Chiquita Brands. Witnesses referred to the respondent United as "United Fruit Company," "United Fruit," or "United." There is no significance in the use of these different terms.

55) Standard established this share by selling bananas which were cheaper than United's and by selling these directly to such retail chains as Safeway, Alpha-Beta and Von's, which were three of the most important retail chains in this market. By 1965, Standard had also made inroads into the business which United had traditionally enjoyed among the jobbers. That year, Standard supplied 21.4 percent of the boxes of bananas sold to jobbers in the Los Angeles area. (CX 406b) Together United and Standard supplied virtually all bananas for the Los Angeles market during the relevant period covered by this complaint.[3]

Neither Standard nor United processed its own bananas. Essentially all of the necessary banana processing operations were performed either by the banana wholesaling specialists, known as banana "jobbers," or by the direct buying retailers or larger general wholesalers, who purchased bananas directly from the importers and processed the bananas themselves.[4]

United and Standard sold their bananas to processors f.o.b. shipside either at an advance order price (for bananas ordered at least two weeks before delivery and subject to adjustment in the event of a lower seaboard price), or at a seaboard price (announced about one week prior to discharge and typically the same as the advance order price) or at, what was called, a roller price, established for unsold bananas placed on common carriers and sold to any takers at whatever price may be indicated at the time of sale by market conditions and the age of the bananas. This price was always lower than the advance order or seaboard prices.

Respondent Harbor was the largest banana wholesale jobber in the Los Angeles area, accounting in 1965 for 40.7 percent of the total dollar volume of bananas sold to jobbers in the Los Angeles area. Its next largest jobber competitor was the Charles C. McCann Company which, together with its wholly-owned subsidiary, W. W. Crenshaw Company, bought 27.5 percent. The

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[3] In 1967, a third corporation called Driscoll Strawberry Associates entered the business of importing unripened bananas into the Southern California market supplying 3.6 percent of the market's requirements in 1967, and 9.2 percent in 1968. (URX 55)

[4] For about fifty years, the Safeway chain had been purchasing directly from importers. In markets outside Los Angeles, retail chains began ripening their own bananas after the introduction of boxed bananas. (Fox, Tr. 1146–47, 1198–1200; Maligie, Tr. 6066–68) Two chains in the Los Angeles area, Von's and Alpha-Beta, began ripening their own bananas in 1964, the year tropically cut and boxed bananas were imported by United into this market. That year, Safeway purchased 14.4 percent, Von's 4.5 percent and Alpha-Beta 1.7 percent of all of the boxes of bananas imported into Southern California. (URX 55a)

remainder of the market was divided among seven jobber companies.[5]

All of the Los Angeles jobber-processors, with the exception of respondent Harbor, had their processing plants in downtown Los Angeles in an area known as the "downtown market." (CX 402b, Maligie, Tr. 2026–36) Harbor's processing plant was located at Long Beach. It was the only jobber maintaining processing facilities at this location.

From 1960 until 1964, United and Standard maintained discharge facilities for their banana shipments to the Los Angeles market at the port of Wilmington and had a program of weekly ship deliveries. Wilmington was 30 miles south of the "downtown market" and about 9 miles north of Harbor's Long Beach plant. All jobbers and chain store customers took delivery of their bananas at Wilmington and transported them by trucks or rail cars to their respective processing plants.[6]

In late February or March 1963, Standard announced its intention to move its discharge facility from the port of Wilmington to Long Beach.[7] It had been looking for a new terminal elsewhere and its announcement represented the culmination of its negotiations with the port of Long Beach for the construction of a new discharge terminal there. (URX 1, 2 a–b) In 1964 Standard notified the trade that arrangements for its new terminal had been completed and that space was available for individual processors

[5] Pacific Banana Company purchased 12.3 percent and Growers Marketing Company 8.0 percent of all bananas sold to jobbers. The market shares of the remaining jobbers were very small: Pan Am Distributing Corporation with 3.5 percent, Paramount Banana Distributors with 3.6 percent, Barnes Banana Company with 2.9 percent. Janelli, which entered the market by purchasing Haggai Banana Supply Company after Haggai went out of business in early 1965, had .2 percent and Los Angeles Banana Distributors had .3 percent of the total market. (CX 406a)

[6] Complaint counsel reproduced a map of the Los Angeles market showing the importer discharge points, the location of the major jobbers' processing plants and the location of major retail chain customers in the area. Considerable argument was made in the record about the relative advantages and disadvantages attached to waterfront location for processing plants as against their location in the downtown area not only from the point of view of trucking costs of unripe bananas to processing plants but also the trucking costs entailed in delivering ripe bananas from these plants to ultimate major customers. The map tends to indicate that trucking costs involved in both operations probably are roughly approximate. (C.C. Ans. Br. 15)

[7] Standard's move from Wilmington to Long Beach was essentially a lateral move along the waterfront encompassing a distance of about 9 miles. While the move would put it directly adjacent to Harbor's Long Beach plant, its distance from jobbers in the downtown area would remain roughly in the neighborhood of 30 miles, the same as if it had stayed at Wilmington. Thus for other jobbers there would be little advantage to them to shift their facilities to take delivery of bananas from Wilmington to Long Beach. (CX 403)

who wanted to locate there. (Fox, Tr. 1242–43; Hoelle, Tr. 1493–94; URX 14, 15; RHX 7b)[8]

Prior to its projected move to Long Beach, Standard had not sold any bananas to Harbor. Harbor made its first purchase of bananas from Standard in January, 1964 and by the end of the year its purchases from Standard accounted for 12.5 percent of its total banana requirements. (URX 55 n, s).

Harbor was United's largest wholesale customer in the United States and its second largest customer. A & P, which was United's largest customer, purchased $1,322,000 of United's bananas during the first three months of 1964. Harbor purchased $1,061,000 from United during this same period. United's next largest customer had purchases of $762,000. (CX 169).

During the period from 1962 through 1965, United had been in constant contact with Harbor over its banana deliveries.[9] In July 1962, Harbor approached United expressing its concern about United's plan to import boxed bananas, fearing that the elimination of the jobber's function of cutting the stems and packing the fruit into boxes would accelerate what it regarded as a trend on the part of retail chains to bypass jobbers and make their banana purchases directly from the importers. (Hoelle, Tr. 1438–1439) At the same time Harbor requested United Fruit not to sell to chain stores and to give Harbor as much advance notice of United's stem conversion date as possible. (Hoelle, Tr. 1439–40)

In December 1962, and again in 1963 Harbor reiterated to United its concerns about the direct purchasing activities of the chains and proposed to United the possibility of locating its ripening plant directly adjacent to United's Wilmington berth as a possible means of reducing its processing costs below those of the retail chains. (Hoelle, Tr. 1443–45, 1447–48; Fox, Tr. 1214–15, CX 7, 9 a–b, 10 a–b) United's response in this period was simply that the conversion to boxed bananas was inevitable and

[8] Construction of the Standard terminal was reported to have started around July 1964 (Hoelle, Tr. 1494–95; URX 18, 19). Standard made its first deliveries to Long Beach in January 1965. (Maligie, Tr. 2287–88, URX 37a-b) During this period, Standard was still importing stemmed bananas although it converted to boxed bananas sometime during the latter part of 1964. (Tr. 4489–90)

[9] Although Harbor was not incorporated until December 1964, the hearing examiner found that Harbor was the successor to the business previously run by members of the Dominick Jebbia family. (I.D. p. 9, n. 12 [p. 70 herein]) Since we affirm the examiner's conclusion and to avoid confusion, we will use the name Harbor when referring to the Jebbia-owned company which was Harbor's predecessor.

that United would continue to sell its bananas to all comers. (Hoelle, Tr. 1439–40, 1447–48; CX 10 a–b; Fox, Tr. 1214) United did explore internally the feasibility of Harbor's proposals for the construction of an integrated discharge facility. It concluded Harbor had the financial resources to build such a facility but decided to do nothing to encourage Harbor since, according to the testimony of United's officials, United already had 100 percent of Harbor's business and the construction of an integrated facility might only serve to upset its other jobber customers. (Hoelle, Tr. 1446)

In 1963, Harbor opened discussions with Standard, after its announced intention to move its discharge berth to Long Beach, about the possibility of constructing integrated facilities, with Harbor building a new processing plant directly adjacent to Standard's new discharge terminal. (Maligie, Tr. 2284–87; D'Antoni, Tr. 5290–92; 5296–5304; RHX 10–11). In January 1964, Harbor and Standard executed an agreement to build adjacent facilities at Long Beach and Harbor opened formal negotiations with the Long Beach Board of Harbor Commissioners for a ground lease for the area adjacent to the premises leased by Standard. (RHX 11, 15, 16, 17a)

At the same time, Harbor continued to press on United its interest in United's construction of such a joint integrated facility either at Wilmington or at Long Beach to obtain direct delivery of bananas into a Harbor plant to be financed by United. In January 1964, Harbor proposed to United that the cost of the plant be reimbursed by United in the event United discontinued delivery of bananas to Harbor at this facility. (Hoelle, Tr. 1450–52; CX 13a–e)

This time United's response to Harbor's direct request to construct such a joint facility was far more positive. It responded to Harbor's January 1964 proposals by agreeing to make direct ship deliveries to Harbor if Harbor would reimburse it for all costs incurred in making such deliveries but rejecting any suggestion that it would indemnify Harbor if it discontinued such shipments. Alternatively, United proposed construction of a joint jobber ripening facility at Wilmington where ripening rooms would be available for lease to Harbor and any other United customer. (CX 17 a–b) At the same time, United also discussed this latter proposal with other jobbers located in the downtown area, who responded that they would prefer to wait and see what

Harbor did. The jobbers testified that they were not contacted again by United regarding the construction of a joint facility. (Sleyko, Tr. 2724; Lynn, Tr. 2887; McCann, Tr. 3742–3; Ferguson, Tr. 3321–23)

In April 1964, four months after its agreement with Standard to build adjacent facilities at Long Beach, Harbor presented United with a contract under which United obligated itself to construct a waterfront ripening facility, the location of which was left unspecified, to be leased by Harbor. (CX 26 b–d) Harbor told United that if it didn't sign this contract, its major competitor would. United signed the agreement conditioned upon its approval by its board of directors. (CX 26a)

Starting in April 1964 and continuing through the summer, United engaged in extensive negotiations with the Long Beach Harbor Commissioners concerning the possibility of relocating its Wilmington facility at Long Beach or of acquiring additional space at Long Beach. (CX 45, 53, 56, 60, 74 a–b, 78, 89, 93; URX 21 a–n, 23 a–b, 28; Cornuelle, Tr. 5070–72)

United made express inquiry and confirmed that both Harbor and Standard had signed leases for adjacent property at the Long Beach waterfront and that Harbor's lease was conditional upon Standard's proceeding with construction by July 1964. In May, United heard that Standard had broken ground for its discharge facility. In that same month, United's board of directors rejected its April 1964 conditional agreement with Harbor because they believed it might conflict with a prior consent order to which United was subject prohibiting it from having any financial interests in a jobber. Nevertheless, United officials continued their negotiations with Harbor to explore alternatives to the April agreement. (Fox, Tr. 1192, 1234–35; Cornuelle, Tr. 5068–69; Hoelle, Tr. 1488–89; CX 44)

Harbor, on its part, consistently maintained that the April agreement was still in effect and continued to press its demands that United was responsible for its construction costs being incurred for its new Long Beach facility. (CX 41 a–b, 49, 54, 57, 62, 66, 68–71, 73, 75–77; Fox, Tr. 1164–67, 1244; Hoelle, Tr. 1496–1500)

In October 1964, United officials met with Harbor at its Long Beach office and toured the construction site where Harbor's and Standard's new facilities were being built. Harbor's officials continued to insist that United meet Standard's competition or

Harbor would buy most of its bananas from Standard.[10] A few weeks later, on October 27, 1964, a second meeting took place at which United officials proposed to Harbor that United was prepared to make one ship delivery per week to Long Beach to meet Standard's competition, that this discharge would not necessarily be permanent and that it would be continued only so long as it remained economically feasible. (Hoelle, Tr. 1530–31; Cornuelle, Tr. 5104–06; URX 36 a–c) Harbor's first response was noncommital and Harbor's president stated that the offer was not sufficient to keep him from buying an unspecified portion of his bananas from Standard. (Hoelle, Tr. 1530; URX 36 b–c) Some days later he informed United that if the proposal were implemented, Harbor would continue to purchase an undesignated portion of its banana requirements from United. (Cornuelle, Tr. 5110–11) In November 1964, United applied for assignment of a Long Beach berth for one day a week. Between November 1964, and early May 1965, United held a series of meetings with its jobber customers located in downtown Los Angeles in an effort to allay their fears that United's new waterfront facility would place them at a competitive disadvantage. (Cornuelle, Tr. 5112–13, Tr. 1535–38) United worked on the details of implementing its decision to make one discharge at Long Beach and met with Harbor in May, 1965 for further discussion of its proposal. Final agreement was reached with Harbor on July 12, 1965. (Hoelle, Tr. 1538–56; Maligie, Tr. 2290; Cornuelle, Tr. 5113–15, 5118–5124, 5179, CX 130, 132 a–b, 135 a–c; CX 140) United's discharge facility was completed in July and United made its first delivery to Long Beach on July 27, 1965. (CX 145 a–b)

From July 27, 1965 to March 4, 1969, about three months after a copy of the proposed complaint in the instant case was served on respondents, United discharged bananas once a week from its ship at its Long Beach berth by conveyor belt directly into Harbor's ripening plant. United never delivered bananas directly into the plants of any other of its jobber customers in the Los Angeles market and never paid any compensation to any such jobbers in lieu of such direct delivery.

United's officials testified, however, that United was willing and ready to make such deliveries if requested although the record indicates that United did not offer to deliver to anyone else

[10] The testimony does not indicate just what was encompassed in Harbor's demands that United meet Standard's competition. (Fox, Tr. 1246–47; Cornuelle, 5077–79, 5081–82, 5150; URX 30 a-b, 31 a-b)

at Long Beach but did not refuse to do so either. (CX 160, Fox, Tr. 1095–96; 1127–28; 1276–77; Hoelle, Tr. 1437; Maligie, Tr. 1890; McCann, Tr. 3735–37; Runnion, Tr. 3452–53; Ferguson, Tr. 3320–21; Lynn, Tr. 2885–88; Sleyko, Tr. 2721–26; Coniglio, Tr. 2517–18; Felder, Tr. 2429–30)[11]

Throughout the four year period during which United's direct conveyor belt discharges were made to Harbor at its Long Beach plant, Harbor continued to purchase United bananas at Wilmington as well. Approximately 45–58 percent of Harbor's total banana purchases from United were delivered at Wilmington. (CX 406–407, 411 a–e, URX 55n; RH 109, p. 31) The balance were delivered at the Long Beach conveyor belt facility. In 1965, United supplied approximately 75 percent of Harbor's banana requirements, with Standard providing the balance. (CX 406a) This compared with Harbor's purchases in 1969 of approximately 70.6 percent of its banana requirements from United and 21.2 percent from Standard. (URX 55)[12]

It was these United weekly shipments at this discharge facility at Long Beach made in response to the demands of Harbor and the competitive threat posed by Standard's location at Long Beach which gave rise to the complaint charges of violations of Section 2(a) and (f) respectively of the amended Clayton Act by respondents United and Harbor. The facts and issues raised with respect to these alleged violations will be discussed in the following section. Discussion of the charges involving Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act of the complaint will follow in separate sections.

## III

## The Count II Allegations

Respondents take issue with the hearing examiner's conclusion that United's delivery of bananas into respondent Harbor's plant

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[11] Only one jobber, Mr. McCann, ever requested delivery from United at Long Beach. United agreed to do so but took no further steps. Mr. McCann never took any further action in this regard. (McCann, Tr. 4200–01, 4468–70, 4456–59; Fox, Tr. 1095–96; Hoelle, Tr. 1437–38)

[12] After 1965, Harbor's purchases from Standard declined, reaching 13.1 percent in 1967 while United sales to Harbor increased to 80.8 percent in that year. (CX 408a) In 1968, Harbor purchased 75.8 and 16.1 percent respectively from United and Standard. (URX 55) These percentages are based on the data offered by complaint counsel. There is some disparity in the figures offered by the parties as to the precise amount of Standard and United banana sales to Harbor. This is principally because the figures offered by complaint counsel are in terms of dollar sales and those offered by respondents are purchases. However, the percentages purchased by Harbor are substantially the same by either measure. Compare C.A. Br. p. 23 with U. Ans. Br. p. 27.

at Long Beach constituted a discrimination in favor of Harbor in violation of Section 2(a) of the Robinson-Patman Act. Respondents argue that a seller has the right to choose the location of its delivery points, that United's discharge point at Long Beach was economically viable, that, while temporary, it was efficient and that United stood ready to make delivery there to all jobbers. Second, respondents argue that even if direct delivery to Harbor were discriminatory, United's other jobber customers were not injured since the examiner, in computing the trucking costs which Harbor saved as a result of United's direct delivery, failed to deduct from them the additional longshoreman labor costs which Harbor incurred in unloading United's bananas into its Long Beach warehouse.

Respondents argue that the examiner was correct in his conclusion that United's decision to make direct belt delivery to Harbor at Long Beach was a good faith response to meet the competition posed by Standard.

Complaint counsel contend that the examiner was right in concluding that United's direct delivery discriminated against its other jobber customers, and that the amount of injury was correctly measured by him as representing the amount of freight charges which Harbor would otherwise have incurred in trucking its bananas from Wilmington to its Long Beach plant. Complaint counsel argue that the examiner erred in his conclusion that United's actions were merely designed to meet competition and that on the contrary, the evidence demonstrates that United reacted unreasonably and that its direct discharge arrangement beat rather than met competition.

Our analysis of the record, the findings of the examiner and the arguments of the parties lead us to conclude that the examiner was correct in his conclusion that United's decision to make direct delivery to Harbor at its Long Beach plant constituted a discriminatory act which injured its other jobber customers. We believe, however, that he was incorrect in concluding that United had made out its meeting competition defense.

### A. *The Special Long Beach Discharge as a Discriminatory Act*

We do not agree with respondents that United's direct discharge at Long Beach was an independent business decision on the part of United to increase the number of its discharge facili-

ties and that its location at Long Beach was merely incidental to this larger decision.

The negotiations between Harbor and United make it quite clear that Harbor was seeking an integrated direct delivery arrangement which would enable it to cut its trucking costs incurred in moving its bananas from shipside to its ripening plant. This concern is evident from the early demands of Harbor which insisted upon some direct delivery arrangement but which were quite open-minded as to whether this arrangement should be established at Wilmington or Long Beach. Thus respondents' efforts to rely on the District Court's language in *Russellville Canning Co.* v. *American Can Co.*, 87 F. Supp. 484, at 498 (W.D. Ark. 1949), *rev'd on other grounds*, 191 F.2d 38 (8th Cir. 1951) appear to us to be quite misplaced. The entire record of the events leading up to this decision and United's central arguments here permit no other conclusion than that United's decision to provide direct delivery to Harbor at its Long Beach plant was in no sense an incidental by-product of some larger business decision to increase the number of its discharge points. It is clear that its Long Beach delivery was decided upon solely to respond to Harbor's demands that it receive special treatment.

Nor do we agree with respondents' contention that United's direct discharge facility at Long Beach was not discriminatory because it was available for use by all United's jobber customers. As the examiner found, United's discharge facility at Long Beach was not designed to serve any customer other than Harbor. It had no truck dock or rail facilities. If other customers took delivery at Long Beach, it would have been necessary to redirect the conveyor belt that led from United's discharge berth to Harbor's plant. Even United's officials agreed that while United probably could have delivered to other customers, deliveries would have "severely taxed the physical facility." (letter from Mr. V. J. Hewitt, vice-president in charge of sales, United Fruit Company, CX 160)

Moreover, United's contention that it was willing to sell to all jobbers at Long Beach, even taken at face value, was essentially a meaningless gesture. United was fully aware that no other jobber had its ripening plant located at either Long Beach or Wilmington. Both Long Beach and Wilmington were equidistance from the downtown market where Harbor's jobber competitors were

located. Thus the opportunity afforded to United's jobber customers in the downtown market to take delivery at Long Beach would hardly have constituted a realistic compensation for the direct advantage conferred on Harbor by direct delivery to its Long Beach plant.[13] Moreover, United was fully aware of the fact that it was direct delivery which was the essence of the benefit being conferred on Harbor. When asked by one of its jobber customers how the downtown jobbers could receive compensation for the fact that Harbor received its bananas directly from the boat, United's branch manager in the Southern California area was reported to have replied "build a banana house down there." (Sleyko, Tr. 2722)

We agree with the examiner that United's direct delivery service, under the circumstances of this case, constituted price discrimination under Section 2(a) of the amended Clayton Act. On this appeal, respondents did not challenge this finding. The complaint charged that United's direct delivery to Harbor constituted a Section 2(a) violation and alleged that "the difference in delivery and loading service has resulted in a substantial discrimination in the ultimate or net price for products sold to its favorite and non-favorite purchasers by respondent United." United's conduct might also be regarded as the furnishing of illegal services to Harbor under Section 2(e) although we recognize that this section is usually invoked to challenge promotional arrangements between the supplier and the customer in connection with the customer's resale of the product. However, whatever the reach of Section 2(e) to practices such as are involved here might be, the instant case was tried on the Section 2(a) theory. Counsel supporting the complaint thus assumed a substantially greater burden of proof than if the case had proceeded on a Section 2(e) theory. Respondents raised the point below as to whether or not this direct delivery to Harbor constituted price discrimination under Section 2(a). They abandoned this argument on appeal. On the particular facts of this case, United's direct delivery service to Harbor was so integrally related to and hence virtually a part of the terms of the original sale of bananas as to render it susceptible to be viewed as an

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[13] Indeed United was fully aware that providing such an opportunity would be a mere sham since United's other jobber customers had "no interest in increasing their costs by receiving shipments from Long Beach." (CX 160)

indirect price discrimination to be governed by the provisions of Section 2(a).[14]

B. *The Existence of Injury Flowing From the Discriminatory Delivery*

None of the parties takes issue with the examiner's finding that the freight costs which Harbor would otherwise have paid in trucking the bananas purchased from United at its Wilmington discharge point to its ripening plant at Long Beach is the measure of the amount of discrimination.[15]

However, respondents appeal from the examiner's findings that the amount of discrimination was "sufficiently significant" that injury to competition must be inferred. (I.D. ff. 36, 37 [pp. 79–80 herein]) Respondents argue that this is an inappropriate case in which to automatically infer injury and that the discrimination did not in fact injure competition because this direct delivery involved additional costs to Harbor which more than offset any potential injury to Harbor's jobber competitors whose plants were located in downtown Los Angeles. Respondents contend that the examiner should have adjusted these costs by deducting from them the additional costs which Harbor incurred in loading these bananas into its Long Beach plant. These costs were higher by reason of the direct discharge at Long Beach because they entailed stevedore labor whose wage rates were higher than the ordinary wage rates paid by Harbor for loading when it took delivery at Wilmington. United offered no evidence as to what this labor differential might have been and argued that the burden was on complaint counsel to establish these facts.

Complaint counsel argue that these costs are irrelevant to the measure of injury and that the record does not demonstrate that Harbor's costs were, in fact, greater.

In our view, the question of Harbor's in plant labor costs incurred in the course of taking advantage of the direct delivery

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[14] Section 2 of the Clayton Act specifically provides that "it shall be unlawful for any person engaged in commerce in the course of such commerce either directly or *indirectly*, to discriminate in price * * *" (emphasis added)

[15] United contests the examiner's alternative basis of quantifying the discrimination (I.D. f. 34 [p. 79 herein]) involving the cost to Harbor of itself transporting the bananas from Wilmington to Long Beach by water because of the absence of any record of basis for the examiner's findings that this would have cost Harbor at least double its transportation costs by truck. We find there was an adequate basis for this finding.

here cannot properly be taken into account in measuring the amount of the benefit conferred on Harbor by United.[16]

It is obviously irrelevant to a violation under Section 2(a) whether or not the discriminatory action subsequently turned out to be less advantageous to the buyer than originally contemplated. In the instant case, direct belt delivery into a jobber's processing plant clearly saved such a jobber the costs involved in trucking the bananas from shipside to the jobber's processing plant. In the instant case, it is clearly admitted by all that United provided this direct delivery service to Harbor and did not provide a similar service to its other jobber customers who continued to incur their trucking costs in taking shipside delivery from United at its Wilmington discharge point.

It is well settled by the cases that additional costs incurred by a favored purchaser do not constitute a defense to a price discrimination case and that only costs savings to *sellers* can be considered as a defense. *General Foods Corp.,* 52 FTC 798 (1956); *Mueller,* 60 FTC 210 (1962) and *Beatrice Kroger,* CCH Trade Reg. Rep ¶ 19,045 (1969) [76 F.T.C. 719].[17]

We agree, therefore, with the examiner that whatever additional labor costs were incurred by Harbor as a result of its union agreements cannot and do not detract from the benefits which it demanded and received from United in the form of direct discharge at its Long Beach plant. We also agree with the examiner that the effect of United's direct delivery to Harbor on its other jobber customers was sufficiently clear to enable him to conclude that injury could be inferred. Our analysis of the record makes it clear that complaint counsel are correct in their contention that the examiner's Findings 36 and 37 are amply supported by the record.[18]

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16 Respondents also sought to argue that direct delivery at Long Beach was not discriminatory in fact because Harbor paid a higher price for bananas delivered at Long Beach than it did for those delivered at Wilmington. The argument rests essentially on the fact that United would not deliver any "rollers," lower priced, as is, bananas to Harbor at Long Beach; however, the non-availability of cheaper bananas at Long Beach in no way detracts from the disadvantage which other jobbers suffered because of the unavailability to them of direct belt delivery into their ripening plants. The discriminatory impact of this direct delivery is not influenced by the amount, types or prices of bananas delivered.

17 The Commission recognized in *Beatrice Kroger* the possibility that the amount of the buyer's costs in appropriate circumstances might be such as to demonstrate that the favored buyer had received no competitive advantage. However, it would be the burden of the respondent to make this showing. In the instant case, the record contains no such showing and respondent cannot rely on its absence to argue that as a result competitive injury has not been demonstrated.

18 *E.g.,* Coniglio, Tr. 2524; Lynn, Tr. 2892; Ferguson, Tr. 3324-25; McCann, Tr. 3752, and record citations in footnotes 19-20, *infra.*

It is well established that a seller's direct or indirect price discrimination which results in a substantial price differential among competing customers in a price sensitive atmosphere, is sufficient to give rise to an inference of reasonable probability of injury to competition. *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37 (1948), *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726 (1945). *In Re Beatrice Foods Co. and The Kroger Co., Inc.*, D. 8663 (December 1, 1969); *aff'd sub nom., The Kroger Co., Inc.*, 438 F.2d 1372 (6th Cir. 1971), *United Biscuit Co. of America* v. *F.T.C.*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); *Foremost Dairies, Inc.* v. *F.T.C.*, 348 F.2d 674 (5th Cir. 1965), *cert. denied*, 382 U.S. 959 (1965).

Competition in the Los Angeles jobber market was extremely price sensitive.[19] As a result of United's direct delivery to Harbor at Long Beach, Harbor saved nine cents freight per box of bananas that it did not have to truck from Wilmington. This savings was significant, because Harbor and the other banana jobbers operated on a small markup per box, relying on sales in large quantities for their profits.[20] A difference of even as little as two cents per box in any of the overhead costs which went into the total markup could make the difference between a profitable or unprofitable year for the jobber.[21]

Thus, a small difference in savings per box of bananas resulted in a substantial difference in the profits or losses of Harbor and would have made a substantial difference in the business of Harbor's competitors.

We agree with the examiner that United's special delivery to Harbor at its Long Beach plant had the effect of reducing Har-

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[19] Maligie, Tr. 2215–17; 6063; Lynn 3091–94; 3218–19; Paul Jebbia 4618–23; 4630–31.

[20] The average prices for the importers banana fluctuated during the period of United's direct discharge; the average price per forty pound box was $3.07 for United's and $2.84 for Standard's bananas. To this price, the wholesalers added their markup which included allowances for wharfage, freight, labor and other overhead costs. The wholesalers' markups varied until October 1966, when Harbor instituted a fixed price markup of 45 cents per forty pound box, and the other wholesalers had to follow suit or Harbor would have undersold them.

[21] Harbor's own expert witnesses analyzed the significance of a few cents difference in the profits or losses of Harbor and its three principal competitors. (Dr. Elliot, RX 109, p. 22; and p. 36, n. 40) The effect of such minimal differences is also seen in the profit and loss statements of Harbor in 1966, the year Harbor instituted a fixed price markup policy which Harbor's manager knew would initially produce an operating loss. From January 1 through October 8, 1966 Harbor realized a net profit of $12,281.57 which equaled 12.5 cents per box. (CX 214z–13; z–10) For the rest of the calendar year, Harbor's monthly losses were 8, 11 and 15 cents per box. (CX 214z–16; z–23; z–28) With these losses of a few cents per box for three months, Harbor's profits before October 8 disappeared into the year-end overall net loss of $26,387.18, which was 2 cents per box. (CX 214z–28; z–30)

bor's freight costs for delivery of these bananas from United's regular discharge facility at Wilmington to its plant in Long Beach, that Harbor's lower costs had competitive significance and that, therefore, respondents' special delivery arrangements at Long Beach constituted a discrimination in price within the meaning of Section 2(a) of the Robinson-Patman Act.

C. *Respondent's Meeting of Competition Defense*

Central to respondent United's defense to the complaint charges of illegal discrimination in this matter is its contention that its decision to make direct delivery to Harbor was designed solely to meet the competition of Standard. The hearing examiner agreed. (I.D. p. 51 [p. 109 herein]) In reaching his conclusion that United's actions were taken in good faith to meet the lawful competition of Standard, the examiner found that at the time of Harbor's demands for special delivery arrangements from United, United had undergone a series of business reversals, its personal relationships with Harbor officials were deteriorating and it was genuinely concerned about the possible loss of Harbor's business and believed it essential to meet Standard's competition. The examiner concluded that its actions in refusing to pay Harbor's in-plant unloading expenses and to deliver only on advance order to Long Beach rendered its actions less than a full meeting of Standard's competition. The examiner also concluded that its actions to meet Standard's competition were not any less entitled to this characterization because in fact United's discharge at Long Beach was directly into Harbor's plant by means of a conveyor belt, whereas Standard's conveyor belt facility was only seldom used during the period in question so that bananas purchased by Harbor from Standard were in fact trucked to Harbor's plant. Finally, the examiner found that United regularly re-examined its direct discharge arrangements with Harbor to make certain that they were necessary as well as economical.

Complaint counsel challenge almost all of these findings and conclusions, contending that United's business reversals were irrelevant and in any event had regularized themselves by 1964, that Standard's bananas had less market acceptance than United's and that United's reaction to Harbor's threats and Standard's direct delivery competition was an unreasonable over-reaction to the market realities confronting United at the time. Complaint

counsel disagree with the examiner that United's reaction was less than a full meeting of competition and urge instead that United's direct delivery at Long Beach was not only unreasonable but that it constituted an excessive reaction to the actual competition presented by Standard's move to Long Beach.[22]

In our view, the issues between the parties on the meeting of competition issue come down to two central points: first, the reality of the market situation confronting United in July 1965 and what United could reasonably have expected to follow from a failure on its part to respond to Harbor's demands for special treatment; and second, whether during the four-year period when this arrangement was in effect, competitive circumstances demonstrated that it was no longer necessary or reasonable to continue the arrangement.

We agree with complaint counsel that United's business reverses going back to the 1950's were no longer an operative relevant factor bearing on the reality of the competitive threat posed to United by Standard's decision to move its discharge facility to Long Beach. As counsel point out, whatever effect these reverses might have had in the past, by 1969, when the events giving rise to the complaint transpired, United had returned to a profit position. (CX 177–III–4) Similarly we do not believe that the quality of the relationship between the officials of Harbor and United and the emotionality of the feelings displayed by the Jebbia family towards United, while undoubtedly distressful, deterred United from maintaining a rational dispassionate view of the economic realities of the circumstances confronting them during this period. We have no doubt that Harbor's officials pursued their demands against United with

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[22] Complaint counsel argue that Standard's conveyor belt delivery was only infrequently used and that, therefore, United's belt deliveries in fact beat Standard's competition. The record indicates that Standard's conveyor belt was not used in part because of inadequate volume of the Standard sales and also in part because of the fact that, unlike United, Standard was servicing all of its jobber customers from Long Beach and that this prevented it from providing continuous uninterrupted belt delivery to Harbor. (Maligie, Tr. 2104–09) We do not have to resolve this issue of which of these two factors was primarily responsible for the infrequency with which the Standard conveyor belt was used to deliver Standard bananas to Harbor. We note in passing that in 1969 when Standard's volume of banana sales increased from about 22 percent to 43 percent, its conveyor belt was apparently used more frequently. We also note that Harbor soon thereafter ceased using Standard's belt entirely since it substituted a completely palletized operation, by which all bananas are transported and ripened on pallets, or portable racks. (Maligie, Tr. 5870–78) We agree with the examiner that to the extent that Standard's belt could not be efficiently and effectively used because of the inadequate volume of Standard's sales to Harbor, the potentiality of the usefulness of Standard's conveyor belt remained whether or not is was actually used. (See I.D. f. 49 [p. 86 herein])

persistent and emotional intensity.[23] However, United's responses reflected a careful businesslike approach to these demands irrespective of the emotionality with which they were pursued.[24] This approach by United's officials underscores the need for us to take the same view of the facts in making our determination as to whether United's action comes within the express defense permitted by the statute granting a seller the right to show that his lower price was made in good faith to meet an equally low price of a competitor.

The central issue before us, then, is whether, given the market realities confronting United in 1964–1965, United was justified in believing that its agreement to grant Harbor a special discriminatory treatment was necessary in order to keep the business of its most important customer in the Los Angeles market.

There is no dispute that since 1962 Harbor has been pressing United to assist it in establishing integrated facilities with it in its efforts to find ways of cutting its costs and thus better enabling it to meet what it regarded as the increasing threats to its business posed by the competition of the direct buying retail chains. United Steadfastly refused to heed the demands of Harbor or do anything which would not be equally available to its other jobber customers. Despite the importance to United of Harbor's business, Standard's mere presence in the market during the 1960–1963 period when Harbor was pressing its demands was not apparently enough of a factor to arouse any

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[23] The record is replete with testimony as to the emotional and sometimes unreasonable attitude of the Jebbia family towards United. *See e.g.* Hoelle, Tr. 1461–66, 1489–90; 1496–1501; 1505; Fox, Tr. 1229–31; 1246–47; 1163; Cornuelle, Tr. 5080–82; 5150.

[24] Each step of United's negotiations with Harbor was accompanied by careful studies of the market realities and economics of the various courses of action considered by United to maintain its profitable business relations with its second most important customer. Just a few weeks after United expressed interest in Harbor's proposal to build a processing plant at Wilmington, in March 1964, United created an internal task force to study the feasibility of a new Wilmington terminal and a joint ripening facility. (CX 182 a-b; Fox, Tr. 1222–24; Hoelle, Tr. 1456–61) In late spring 1964, the sales department undertook a study of the effect of a loss of Harbor's business, assuming a second weekly delivery to Los Angeles. (URX 12 a-b; Hoelle, Tr. 1414–15; 1486–88) In the fall of 1964, the sales department analyzed the effect of shifting sales into alternative markets if United lost Harbor's business. (URX 32a) At the same time, the transportation department studied the feasibility, including cost, of a weekly discharge at Long Beach. (CX 103 a-b, 98 a-b) An alternative course of action, that of sharing Standard's terminal, was considered but rejected after detailed cost study revealed a disproportionate cost savings to Standard. (URX 34 a-b; CX 97 a-b; Hoelle, Tr. 1527; Cornuelle, Tr. 1501–02) Upon receipt of these studies, United tentatively decided to make one weekly discharge to Harbor. (Cornuelle, Tr. 5099–5103) A few months later, because of complaints from other jobbers, this decision was completely re-evaluated by Mr. Hoelle in a study made in April 1965. (CX 132 a-b; CX 130; Hoelle, Tr. 1538–41)

real concern on the part of United to respond to Harbor's demands.[25]

However, the situation as United perceived it changed in 1964, when Standard announced its decision to move its entire operations to Long Beach. By that year, Standard had gained 35 percent of the Los Angeles market. It began to sell bananas to Harbor and that year accounted for 12.5 percent of Harbor's requirements. Thus, Standard's decision to locate at Long Beach and to build an integrated facility adjacent to Harbor's plant obviously signalled to United that its virtual monopoly over Harbor's business was being challenged.[26] As a result of its negotiations with Standard, Harbor acquired the dock side facility which it had been attempting to persuade United to build or to finance for it.

The record is not clear whether United might have had an option during the early period of its negotiations with Harbor to forestall Harbor from building its new ripening plant adjacent to Standard's Long Beach discharge facility if it had agreed to finance Harbor's construction of such a plant at Wilmington. The record is similarly not clear whether Harbor's proposal that United build such a plant foundered on United's insistence that such a ripening plant would have to be open to all jobbers or whether the proposal was never pursued because of United's reluctance to agree to establish such a facility. The record is clear that United considered and rejected— on economic considerations of greater costs—the transfer of its entire discharge terminal from Wilmington to Long Beach.

In any event, once Standard announced its locational change, Harbor did not on that account lessen its pressures on United. Indeed its pressures became more insistent this time backed up by its threat to shift its business to Standard.

Harbor's continued efforts to get United to finance its new Long Beach ripening plant and to establish an integrated discharge facility at Long Beach despite Standard's decision to

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[25] Prior to 1964, United enjoyed 100 percent of Harbor's business which accounted for 41 percent of its total sales and made Harbor its second largest customer. Thus in 1963, United earned a profit of $2,478,000 on its Los Angeles market banana sales, $888,000 or one-third of which was contributed by Harbor.

[26] Moreover, United was aware that at the end of 1964, the Jebbia family sold one-half their interest and control in Harbor to Standard's ex-president, Dr. Joseph D'Antoni, and that, about the same time, Standard's west coast sales manager, Albert Maligie, was hired as general manager of Harbor. (D'Antoni, Tr. 5221-35; 5241-45; 5284-85; Maligie, Tr. 1679-80; RHX 61).

locate there must have made it obvious to United that it was *United's* concession which it wanted rather than simply the opportunity to lower its own banana costs through direct deliveries. If it had been the latter, the negotiations would have essentially been over when United refused and Standard agreed to make direct belt delivery of bananas into Harbor's ripening plant. Since Harbor continued its pressures on United, the issue for United then became one essentially of evaluating whether or not Harbor's threat to shift its business to Standard was realistic.

United argues that its decision to make the weekly Long Beach discharge directly into Harbor's plant was solely to meet Standard's competition. The difficulties which we find in United's contentions on this point are several. United's bananas by all accounts commanded a unique market acceptance enjoyed by no other importer.[27] Throughout the 1964–1969 period the average price of United's bananas was consistently higher than the prices of those of its importer competitors.[28] Its Chiquita branded banana sold at a higher price than Standard's banana, while its unbranded banana sold at a lower price.[29]

[27] The record contains considerable testimony about the several inferiorities of Standard's bananas. Because of a condition known as "neck rot" or "crown rot," the Gros Michel variety of bananas which Standard imported until 1968 was "quite inferior" for most of the summer months and into fall, even though in winter and early spring, it was a "good quality banana." (Heintz, Tr. 4494–4496) In 1966 and 1967, Harbor's manager complained to Standard about the quality of its bananas and on several occasions in 1967 Standard had to dump some of its bananas because there was no market for them. (RHX 49–50)

[28] *Average Price Per Box—Southern California*

| | | | (Computed from URX 55) | | | |
|---|---|---|---|---|---|---|
| Importer | 1964 | 1965 | 1966 | 1967 | 1968 | 1969 |
| United | $3.60 | $3.25 | $2.94 | $3.08 | $3.07 | $3.01 |
| Standards | 3.30 | 2.96 | 2.76 | 2.82 | 2.97 | 2.68 |
| Driscoll | — | — | — | 2.58 | 2.09 | 1.61 |

[29] *Average Price Per Box—Southern California*

| | (Computed from CX 406, 407, 408) United Chiquita | United Unbranded | Standard |
|---|---|---|---|
| 1965 | $3.38 | $2.10 | $2.74 |
| 1966 | 3.05 | 2.30 | 2.66 |
| 1967 | 3.18 | 2.24 | 2.68 |

About 80 percent of United's bananas sold to Harbor and its other jobber and retail customers were of the Chiquita brand label. At least until 1968, United's bananas were recognized to have greater customer acceptance.

United argued that the price differential between its bananas and Standard's was not in fact due to any objective differences in quality but to what was referred to as an educational time lag in retailer recognition of the quality of Standard's bananas (Heintz, Tr. 4543–44, Maligie, Tr. 2269–72).[30] Whatever the reason, the record is clear that United's bananas enjoyed such a clear superiority in market acceptance that jobbers could not afford *not* to handle United bananas and service their customers.

Harbor admitted its dependence on United's bananas and stated that it could not have operated as successfully or sold as many bananas without United's business. (Maligie, Tr. 2115) Indeed, in 1964, the same year in which United presented its proposal to respond to Harbor's demands, United itself had successfully threatened Harbor that it would discontinue banana sales to Harbor unless Harbor paid a bill which it owed United. According to Fox and Hoelle, Harbor when confronted with this threat, capitulated immediately and paid its bill. (Tr. 1168, 1428) United's threat was made to Harbor in mid-1964 at a time when it knew of Standard's intentions to locate in Long Beach, when Standard had already started to sell bananas to Harbor and while Harbor was still pressing United for direct deliveries at Long Beach. If in June 1964, United could successfully threaten Harbor with termination of banana deliveries in order to get Harbor to stop using non-payment as leverage for its demands that United assist Harbor in its construction of a waterfront facility, it seems inconsistent for United to argue that a year later when it capitulated to these demands it was required to do so in order to meet the competition of Standard.[31]

Harbor's dependence on and need for United's bananas would seem to be further borne out by the fact that instead of increasing its banana purchases from Standard which could have rendered Standard's conveyor belt delivery more efficient and

[30] United's contention in this respect would seem to have some support from the fact that in 1964 the self-ripening chains purchased 92 percent of their combined banana needs from standard. (U. Ans. Br., 14). We do not believe, however, that the reasons underlying the superior market acceptance of United's banana is material to the issues posed here.

[31] Respondents argue in their briefs that in fact Harbor's decision to pay its bill owed to United had nothing to do with United's threat to cut off suppliers but responded rather to Harbor's recognition that the bill was in fact owing. (U. Ans. Br. 14, n. 15; H. Ans. Br., 6–7) We do not believe that the motivation of Harbor is significant here. What is significant is that at a time when United contended it believed Harbor was serious in its threat to cut off its purchases from United, United itself did not seek to press Harbor into paying through the threat of legal action but rather used exactly the same threat of discontinuing banana delivering in order to pressure Harbor into paying its bill!

acceptable and saved Harbor its six cent per box trucking expenses for the Standard bananas which it did purchase, Harbor continued to purchase almost fifty percent of its banana requirements from United at its Wilmington discharge port at a per box trucking cost of nine cents. It is unreasonable to believe that Harbor would have acted so contrary to its clear economic interests if the Standard and United bananas were interchangeable.

Moreover, United was fully aware of this fact. It never apparently contemplated that its Long Beach discharge facility would handle all of its potential banana sales to Harbor.[32] Indeed throughout the period of the discriminatory delivery, only about half of its banana sales to Harbor continued to be delivered to Harbor at United's Long Beach facility. Thus, it is clear that it knew at the outset that Harbor's threat to shift all of its banana purchases to Standard was incapable of being carried out. Moreover, Standard continued to sell bananas to Harbor during this period so that United's direct delivery decision was not designed in the traditional fashion to meet an equally low offer of a competitor in the sense of attempting to meet an offer looking to an individual sales transaction or secure a particular supply contract. Business between Harbor, Standard and United continued as usual. If quality was the same and Harbor was concerned solely with obtaining its banana requirements at the lowest possible cost, one could have expected that, given its threat about shifting its business to Standard unless United complied with its demands, Harbor would have carried out its threat to the extent of all those bananas which it needed and which it could not obtain from United at its Long Beach discharge point.

Respondents seek to dispel any significance attaching to those substantial Harbor purchases at United's Wilmington plant by suggesting that Harbor wanted rollers which United refused to sell it at Long Beach and that Harbor wanted the benefit of banana deliveries on Mondays and Thursdays which could only be had at Wilmington in addition to its deliveries on Tuesdays or (beginning in 1967) Wednesdays at Long Beach. There is nothing in the record to indicate that the bulk of the bananas purchased by Harbor at United's Wilmington port were rollers.

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[32] As the examiner found, United delivered approximately once a week to Long Beach. (I.D. ff. 26-27 [pp. 76-77 herein]) There is no evidence that United contemplated making more than one delivery per week to Harbor.

Moreover, although multiple shipment dates were advantageous, this advantage would not justify the additional expense of transporting bananas from Wilmington to Long Beach. If additional delivery dates had been so important, the major jobbers would have ordered a greater percentage of their bananas from Standard since Standard delivered on Tuesdays at Long Beach. However, the principal jobbers purchased the great majority of their bananas from United. McCann, Pacific and Growers purchased between 87 percent and 100 percent of their bananas from United from 1965 through 1967. (CX 406a, 407a, 408a)

Finally, with virtually no change in any of the external circumstances surrounding the business between Harbor, United and Standard, United decided to discontinue its direct delivery at Long Beach in March, 1969, thus signalling in effect that the necessity to meet Standard's competition no longer existed.

While market developments after United's decision to establish a discharge facility at Long Beach cannot obviously be of much value in illuminating what United might reasonably have anticipated at the time it made its original decision, nevertheless it seems to us to be of some significance that United abandoned the direct delivery arrangement in March 1969 at a time when Standard's competitive threat appeared to be far more serious than it appeared to be in 1964. By 1968–69, it seems generally agreed that Standard's bananas had acquired general market acceptance. Moreover, by 1969 Standard was beginning to ape United's very successful marketing technique of brand labeling its bananas and promoting them directly to the consumer. This action on the part of United inevitably must raise some question about the sincerity or reality of its fears of four years earlier before such market acceptance had been achieved, that it believed it necessary to meet Harbor's demands or risk losing its banana business to Standard when its same action four years later was not feared to have the same effect.

Apparently recognizing that the external circumstances of the competitive market in the Los Angeles area were roughly constant between the 1964–1969 periods when the direct discharge was agreed upon and instituted and 1969 when it was discontinued, United argues it was better able in 1969 to withstand the loss of market which discontinuance might entail than it would have been in 1964–1965.

Unfortunately, there is virtually nothing in the record which

sheds any light on why the same economic circumstances in 1964 appeared so diametrically different to United in 1969. Nor are there any facts or evidence in the record as to what transpired in the interim period for United which made it so much better able to live with any possible market loss which might ensue. Moreover, respondent's argument misses the point of the good faith meeting of competition defense. Whether a company believes it can afford to risk a possible loss of business is not the measure of whether it is confronted with a lower competitive offer which it believes it must meet in order to retain the customer's business.

It seems, therefore, irrefutable from the record that Harbor would never have carried through on its threat to shift its banana business from United to Standard unless United met Standard's competition and provided Harbor with direct belt delivery at Long Beach. Given United's own recognition of its bargaining power, it seems unreasonable and unbelievable that it genuinely feared that it would lose Harbor as a customer to Standard unless it met Standard's competition. That there might have been a possibility that it might have suffered some competitive loss of an unknown dimension unless it capitulated to Harbor's demands is not a sufficient basis for it to be able to invoke the meeting of competition defense without some greater showing of the likelihood that what it feared might happen would in fact have happened or that it was reasonable for it to assume that its fears might have been confirmed.

The case law is clear that a competitor may meet an equally low price of his competitor provided he acts in good faith to what he reasonably believes is a situation of competitive necessity. The test is a highly pragmatic one and takes into consideration the market realities confronting a seller both at the time the initial decision is taken as well as the developments in the market subsequent to the decision. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) ; *Continental Baking Co.*, 63 FTC 2071, 2163 (1963) The burden is on respondent to establish his good faith defense. *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505 (1963)

Taking into account all of the circumstances surrounding United's decision to establish its Long Beach direct delivery, its strong market position in the Los Angeles market, the established market acceptance which its bananas uniquely enjoyed in that market thus enabling it to continue to sell bananas to

Harbor at its Wilmington location, the fact that it recognized and used this superior market acceptance of its bananas as bargaining power when the occasion demanded it, and the fact that, as it claims, it determined voluntarily to discontinue this arrangement at a time when Standard's market position had substantially improved, we are convinced that the hearing examiner erred in concluding that United acted in order to meet the equally low price of a competitor.

Count II Allegations

The complaint charged respondent Harbor with knowingly inducing and receiving a net price advantage through United's direct discharge to its plant, in violation of Section 2(f) of the amended Clayton Act. The hearing examiner dismissed this count, finding that as a matter of law Harbor could not have violated this section when United was absolved of liability under the good-faith meeting competition defense of Section 2(b).

Complaint counsel vigorously contest this conclusion both as a matter of law and as a matter of fact. Counsel argue that the examiner totally ignored the commission's decision in *Beatrice Kroger* in which the Commission laid down the basic principal that a buyer may violate Section 2(f) of the amended Clayton Act even though the seller is exonerated from the violation of Section 2(a). Complaint counsel also argue that in the instant case Harbor clearly violated Section 2(f) because it "knew that it was not going to switch to Standard's bananas because it knew that it depended on United's superior quality to satisfy its customers. Harbor also knew that Standard was not utilizing the beltway for deliveries on a regular basis * * *." (C. A. Br. p. 30)

Respondent Harbor denies that the *Beatrice Kroger* decision is applicable to the facts in this case and points out that the circuit court, in affirming the Commission's decision, was careful to point out that in its judgment "the controlling point here is * * * the misrepresentation [by the buyer] * * * in order to induce a discriminatory price." (438 F.2d 1372, 1378) Harbor also argues that in the instant case not only was there no misrepresentation on its part but that it had every reason to believe that United's deliveries were non-discriminatory and caused no competitive injury and that overall its expenses in handling United's belt deliveries more than offset whatever ad-

vantages over its jobber competition direct delivery might have potentially or theoretically conferred on it. (H. Ans. Br., pp. 19, 20)

As we have discussed above, we conclude that United's direct belt delivery to Harbor's Long Beach plant constituted an illegal discriminatory action which had the likelihood of injuring competition.

It is clear that the thrust of Section 2(f) is the inducement of the discrimination which Section 2(a) declares illegal. We have already discussed our rationale for rejecting Harbor's contentions that the benefit conferred on it by United's special discharge arrangements to its Long Beach plant in the long run proved to have been less advantageous than originally contemplated because of its alleged increased longshoremen costs and the like more than offset the docking savings which direct delivery provided.

The issue under Section 2(f) thus focuses essentially on the question of whether Harbor knew or should have known that its demand for direct belt delivery from United would be illegally discriminatory. *Automatic Canteen Co. of America* v. *F.T.C.*, 346 U.S. 61 (1953).

In the instant case, it is quite clear that all of the facts surrounding United's direct belt delivery to Harbor were fully known to all parties. Harbor knew that bananas sold to all jobbers f.o.b. shipside Wilmington and that all jobbers taking delivery of United bananas at Wilmington had to truck them to their processing plants. Harbor knew what its trucking costs from Wilmington to Long Beach were and knew that none of its jobber competitiors were receiving direct belt delivery from United of the bananas which they were purchasing at Wilmington. Even more important, Harbor knew its need to carry United's bananas in order to do business in the banana market. For it to threaten United that it would switch its United business to Standard unless United capitulated to its demands for direct delivery was clearly an effort to procure a price concession from United rather than a bona fide statement of its intentions which it had every expectation of carrying out if United did not meet Standard's competition. Moreover, its subsequent purchasing behavior with respect to United's bananas which were not delivered to it at Long Beach after United agreed demonstrates that it never had any intention of switching its United purchases to Standard.

The record makes clear that Harbor purchased approximately 50 percent of its banana requirements from United at Wilmington, despite the fact that these bananas cost it more than the bananas it purchased at Long Beach from either United or Standard and despite the fact that if it had increased its Standard purchases at Long Beach, use of Standard's conveyor belt delivery would have lowered the cost of these bananas to Harbor.

We are convinced, therefore, that Harbor knowingly induced and received United's discriminatory delivery at Long Beach in violation of Section 2(f) of the Robinson-Patman Act as charged in Count II of the complaint. Accordingly, we find that the examiner erred in dismissing this count.

## Count III Allegations

Count III of the complaint charges that Harbor violated Section 5 of the Federal Trade Commission Act insofar as it (1) sold bananas at unreasonably low prices; (2) developed overcapacity; (3) induced discriminatory terms in the delivery of bananas; and (4) acquired the business and assets of its largest competitor. The complaint charges that these acts by Harbor had the effect of restraining competition and creating a monopoly in Harbor in the sale and distribution of bananas in the Los Angeles area and constituted unfair methods of competition and unfair acts and practices.

United is also charged with violating Section 5 insofar as it is alleged to have aided and abetted Harbor in its efforts to monopolize the Los Angeles banana market.

The hearing examiner concluded that the proof failed to establish that Harbor—and hence United—had attempted to monopolize the Los Angeles banana market. The examiner refused to consider whether these acts or practices by Harbor by themselves constituted unfair acts of competition or unfair acts or practices because of his conclusion that—contrary to complaint counsel's assertion—the complaint did not charge these various acts and practices by Harbor as separate Section 5 violations, absent the attempt to monopolize charge.

Thus the issues on appeal under this Count III involve three questions: did Harbor (and United) engage in the particular acts and practices alleged; did these acts and practices amount to an attempt to monopolize the sale and distribution of bananas

in the Los Angeles market; did the complaint charge, and do these acts or practices constitute separate violations of Section 5 as unfair acts of competition and unfair acts or practices?

A. *The Attempt to Monopolize Issue*

The examiner found that bananas constituted a clearly identifiable and separate product market and that the relevant geographic market for purposes of measuring the monopolization charges was Los Angeles and Orange Counties. The examiner concluded, however, that, while Harbor had engaged in the acts charged, the proof failed to establish the requisite intent to monopolize to sustain the complaint allegations that these acts constituted an attempt on the part of Harbor to monopolize the sale and distribution of bananas in the relevant market.

Respondents challenge the examiner's finding with respect to the proper product and geographic market and complaint counsel challenge the examiner's conclusions that the specific acts and practices engaged in by Harbor were not engaged in as part of an attempt on its part to monopolize the Los Angeles banana market and were not thus a violation of Section 5.

1. The Relevant Product Market

Harbor takes the position that bananas do not constitute a separate product market and that the proper market here must be all fresh fruit.

The examiner's findings and conclusions reflect a careful analysis of the record facts bearing on this issue and of the relevant case law. The record demonstrates clearly that bananas have peculiar product characteristics which require specialized vendors and ripening facilities. (I.D. ff. 57–61 [pp. 88–89 herein]) They have distinct prices which show little price sensitivity to the prices of other fruits. (RHX 201–22) Both United and Standard and all but one of the jobbers in the Los Angeles market deal almost exclusively in bananas.[33] These factors are clearly rele-

[33] Of the banana jobbers participating in the Los Angeles market, only Kaplan's Fruit and Produce Company was a multi-line produce handler. (I.D. ff. 83–86 [pp. 96–97 herein]) The others dealt exclusively in bananas or had very small sales of other produce, as in the case of Harbor, which sold small amounts of pineapples after acquiring the McCann Company. (I.D. f. 7 [p. 71 herein])

vant to the definition of markets for purposes of antitrust issues.[34] We, therefore, reject respondent's contentions and sustain the examiner's findings and conclusions on this issue as to the proper definition of the product market involved in the attempt to monopolize count.

2. The Relevant Geographic Market

The examiner found that the relevant geographic market for the purposes of this case consisted of Los Angeles and Orange Counties, basing his decision essentially on the geographic area in which Harbor distributed its bananas and on the testimony of other jobbers to the effect that as a practical matter these two counties defined the area of their principal competition.

Recognizing that there was some slip over beyond the boundaries of these two counties, the examiner nevertheless concluded that the significance attached by respondents to this spillover "lost sight of the very practical limit placed on price competition by the distances to be travelled and the truck costs involved in the enlarged area proposed by respondents." The examiner concluded:

> We opt for the practical judgment of the jobbers in the market as to where their principal competition arose, particularly since the extent of the geographic market cannot be precisely delineated. (I.D. p. 56 [p. 114 herein])

We have carefully examined respondents' contention that the proper geographic market here should be the nine southern California counties because there was sufficient competition between the jobbers located in the Los Angeles-Orange Counties area and those located in the other seven counties to require the entire county area to be regarded as the relevant geographic market for the purpose of this case. This contention is not substantiated by the record.

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[34] In *Brown Shoe v. United States*, 370 U.S. 294 (1962) the Supreme Court laid down the following factors which should be looked to in defining the relevant market:
"The outer boundaries of the product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves constitute product markets for antitrust purposes * * *. The boundaries for such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (At p. 325)

The record is clear that only three of the eight jobbers competing in the Los Angeles-Orange county area made deliveries outside the area and these were in small quantities and very occasional. (Tr. 3812–13, 1793–94, 1713–14) Harbor made some sales outside this two-county area but the largest customer outside the area represented only 6.5 percent of Harbor's sales during the relevant period. (Tr. 4586–87) The record also indicates that some customers who took delivery within the two-county area in fact had their businesses outside the area. However, the evidence is not adequate to establish how often sales were made to their customers and in what quantities. (Maligie, Tr. 1702–16; Sleyko, Tr. 2757–62; Lynn, Tr. 3148–53; Ferguson, Tr. 3402; 3361–63; 3318–20; Coniglio, Tr. 3630–33) As the examiner observed, there was some competition outside the two-county area, but it is clear that the record does not permit precise quantification of its volume. Thus the record does not provide any basis to refute the jobbers' (including Harbor's) own appraisal of their principal competition as lying within the Los Angeles and Orange counties. (Felder, Tr. 2426–29; Coniglio, Tr. 2504, 2608; Sleyko, Tr. 2719–21; Lynn, Tr. 2885; Ferguson, Tr. 3317–18; McCann, Tr. 3868–74, CX 220 a–b)

In considering the geographic boundaries of the market, the examiner concluded that the competition offered by retail chains should not properly be included for this purpose. (I.D. p. 57 [p. 114 herein]) We agree with the examiner that the retail chains cannot be regarded as a part of the market in which the jobbers were operating since they obviously were not competing with the jobbers for retail customers. All parties agree that the principal focus of competition involved in the monopolization charge is the sale and distribution by the jobbers.

Accordingly, we do not believe that respondents' contention that the larger geographic market should be looked to for purposes of determining the monopolization issue in this count can be sustained. We agree with the examiner in his rejection of this contention.

### 3. Harbor's Activities as Attempts to Monopolize

The complaint identifies four activities in which Harbor engaged which are alleged to evidence its attempt to monopolize the distribution and sale of bananas in the Los Angeles-Orange county area. Two of these activities are alleged as separate law violations:

its inducement of discriminatory prices from United, (alleged in Count II as a violation of Section 2(f) of the amended Clayton Act) and its acquisition of its largest competitor in the Los Angeles-Orange county market (alleged in Count IV as a violation of Section 7 of the Clayton Act). The other two activities relied upon in this count as evidencing Harbor's alleged attempt to monopolize are Harbor's institution of a fixed markup pricing policy in the sale of bananas to its customers and its construction of its new ripening plant in Long Beach.

We will consider the evidence respecting Harbor's pricing and plant expansion activities first, and, thereafter, consider whether any of the four activities alleged in Count III considered separately or together, constitute an attempt to monopolize the banana market.

(a) *Harbor's Pricing Policies*

In October 1966, Harbor adopted a new pricing policy for its bananas which fixed its wholesale price at 45 cents above the price which it paid for its bananas from United and Standard.

Harbor's general manager, Mr. Maligie, stated at the hearing that when he instituted Harbor's fixed markup of 45 cents per box, he knew that Harbor would lose money initially. (Tr. 6084–85) It was his hope that, with this price structure, Harbor would increase its sales volume. (Tr. 6085) Mr. Maligie estimated that with a 20 percent increase in volume, Harbor would make a profit. (Tr. 6085–86) As anticipated, Harbor lost money from October 1966 until late summer or early fall of 1967 when Harbor's volume increased to the point which Mr. Maligie had anticipated was necessary for a profit. (Maligie, Tr. 6123) Harbor continued to operate at a profit in 1968, but in May 1968, it raised its fixed markup from 45 cents to 50 cents. (Tr. 6055–57; CX 528 a & b)

Harbor's officials testified that Harbor initiated its 45 cent fixed price policy as part of its efforts to meet the emerging competitive threat posed to its business and—to that of all jobbers—by the trend of retail chain customers to bypass the jobbers, purchase directly from the importers and perform their own ripening processes. (Maligie, Tr. 6047–48; 6064–65) The evidence bears out the contentions of Harbor in this respect. In 1966, Harbor's market share and total volume of sales were dropping. (Maligie, Tr. 6059) Several of Harbor's chain store customers were complaining about the jobbers' high markups and their own

competition with Safeway who was advertising bananas at 10 cents a pound and as "ripened to perfection" and "ripened in our own ripening rooms." (Maligie, Tr. 5999–6001; 6003–09)

The immediate precipitating cause of Harbor's decision to institute this 45 cent pricing policy came from Ralph's Grocery Company, a Harbor customer and an important factor in the market. In the summer of 1966, Ralph's conducted a study of the economic feasibility of installing its own banana ripening rooms. (Tr. 6045; 6442; RH 5) The jobbers were aware of and concerned about this study. (Maligie, Tr. 6046–48; Ferguson, Tr. 3415–18; Lynn, Tr. 3255; Hooker, Tr. 6444–45) Ralph's invited Harbor and several of its competitors to submit bids on the basis of a fixed markup above cost. (Hooker, Tr. 6442, 6446–47) Harbor ultimately won the bid with a price of 45 cents per box above seaboard price and received 80 percent of Ralph's business, a sizeable increase over its prior business with Ralph's. (Maligie, Tr. 6049–50; 6052–53; 6046; 1987)

Harbor considered whether it should confine this bid price solely to Ralph's or whether it was required or desirable to make it available to all its customers. Harbor's counsel advised that the price should be offered to all its customers and Harbor officials also felt that apart from the legal requirements, it would be bad customer relations with its better customers to confine the price offer to Ralph's. (Maligie, Tr. 6059; 6081–84; CX 161; D'Antoni, Tr. 5251–52)

Nothing in the record throws any doubt on the reasonableness of the estimates by Harbor's officials that they could increase Harbor's sales volume to a point where its 45 cent fixed price could return a profit to Harbor. Nor does the record contain any evidence tending to refute the testimony of Harbor's officials that their primary motive in adopting this pricing policy was their belief that this policy would enable the non-self-processing chains to compete with the self-processing chains and thus remove this incentive for them to move into self-ripening and direct-purchasing and bypass the banana jobbers. (Maligie, Tr. 6064–6976) The record indicates that in fact, Mr. Maligie's predictions as to the hoped for impact of Harbor's pricing policy were correct and the jobbers' shares of the market improved (URX 55)

The record also indicates that while the jobbers complained about Harbor's markup, believing it was too low to be profitable, all but one increased the total dollar volume of their sales and

the percentage of their market shares for the total period 1965–1968, although most suffered losses during the first year following the institution of the new price. (URX 55)[35]

The examiner rejected respondents' contentions that the sales were not in interstate commerce; and that in order to determine whether Harbor suffered any losses in profit during the period when the 45-cent fixed price was in effect it was necessary to look at the profit and loss position of the combined enterprise of Harbor and its parent company. (I.D. ff. 91–92 [pp. 99–100 herein]) He found that Harbor's sales were below cost but that its fixed price policy was adopted for the purpose and with the intent of increasing its efficiency and volume and decreasing the impact of the self-ripening chains. (I.D. f. 94 [p. 100 herein]) As the examiner asserted:

> Admittedly, Harbor knowingly sold below cost when it adopted a 45-cent price above the seaboard price as its price overall. Technically, it did not reach this price as a result of competitive bidding. And, technically, its reason was not to meet competition but to meet the threat that Ralph's Grocery Company would adopt self-ripening and bypass the jobber ripeners completely. Whatever might have been its liability under a simple charge of selling at unreasonably low prices, the proof failed to establish that the price fixed was fixed with an intent to monopolize. It was a purely defensive measure to maintain the channel of jobber distribution. (I.D. p. 54 [p. 111 herein]).

We agree with the examiner's reasoning and findings on these issues. Harbor's banana sales were in interstate commerce since a number of the sales were to customers located outside the State

[35] The extent of injury to Harbor's competitors was greatly contested. As the examiner noted, Harbor's competitors were not injured to the extent that an examination of the unaudited profit and loss figures would imply, since serious accounting errors in these statements were brought out by respondents on cross-examination. (I.D. f. 93 [p. 100 herein]) If these statements are adjusted, however, as they were during the cross-examination, they still reflect serious net losses to Harbor's competitors in the year following the institution of Harbor's pricing policy, as this table indicates:

| Jobber Net Profit (Loss): | 1966 | 1967 | 1968 |
|---|---|---|---|
| McCann | $19,273.17 | $1,845.19 | — |
| Crenshaw* (total sales) | 15,410.55 | 2,400.97 | — |
| Pacific (banana operations) | 17,287.16 | ($20,476.45) | $18,552.91 |
| Growers (fiscal year ended in April) | | 9,811 | 14,721 |
| Pan Am (fiscal year ended in March) | 8,900 | ($6,619) | 1,858 |

*Crenshaw also sold pineapples. It is not possible to separate operating expenses attributable to pineapples from those attributable to bananas.

of California. (Maligie, Tr. 1972; 1868–70; 1722–25; CX 225–232; 235–240)[36] It is also clear that Harbor was carefully established as a separate enterprise to engage in the business of processing and selling bananas.[37] As the examiner concluded, Harbor and its parent company operated as two separate and distinct entities and must be considered as such.

We also agree with the examiner's findings that Harbor was concerned with the threat to its business from the emergence of self-ripening chains and that its actions were clearly in response to that threat. We find nothing in these actions which evidences any specific intent on the part of Harbor to attempt to monopolize his market and agree with the examiner's view of the facts and with his rationale for his conclusion on this point. (I.D. pp. 42, 54 [pp. 100, 111 herein])

(b) *Harbor's New Plant Construction*

Two years before Harbor's fixed price policy was instituted, Harbor began construction of the new processing plant at Long Beach, which has been discussed previously in connection with the Count II charges of its illegal inducement of United's discriminatory direct conveyor belt discharge to its Long Beach plant. The complaint alleged that this plant had the capacity to handle, process, and store enough bananas to satisfy the entire needs of the Los Angeles market area at the time of the complaint and that it exceeded the total capacity of Harbor's own plant capacity and all its competitors combined. Complaint counsel argue that the construction of a plant of this size conclusively evidences Harbor's intent to monopolize the Los Angeles-Orange county banana market.

Respondents disagree with the complaint's allegations respecting the capacity of this plant and argue that its maximum capacity was in the range of 57,000 to 60,000 boxes which was no where near the total banana sales for the Los Angeles market. The examiner agreed with respondents' position on this point.

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[36] Respondent Harbor argued that Harbor's sales were not in interstate commerce because only a small percentage of Harbor's sales were to customers located outside the State of California. This position has been rejected by the courts. *See e.g. Safeway Stores, Inc.* v. *F.T.C.*, 366 F.2d 795 (9th Cir. 1966)

[37] During the reorganization of Harbor's banana distribution business in 1965, the D & J Company was created as a limited partnership to hold the assets of the business. Harbor Banana Distributors, Inc. was created as a separate, wholly-owned corporate subsidiary to lease the banana business assets from the partnership and operate the business. (Pilie, Tr. 4854–56)

Essentially, complaint counsel's proof to support the alleged capacity of Harbor's plant is based on several statements contained in Harbor's press releases and other promotional materials announcing its new plant and on the statements of several jobbers who viewed Harbor's plant. (Lynn, Tr. 2730; Sleyko, Tr. 2940) One of Harbor's announcements stated that the new plant would process about 150,000 boxes a week, which would supply 17 million people (CX 34b)[38] A press release dated July 28, 1965, the day of the opening of Harbor's new plant, claimed that the plant was the world's largest, capable of holding 80,000 boxes, and was expected to handle 40,000 boxes a week. (CX 209 a–c; see also CX 210–212)

At trial, Mr. Maligie disavowed the statements contained in Harbor's promotional materials issued at the time of its public announcement of its new plant as "very much puffed-up" and in some respects as simply untrue. (Tr. 1911–23; 1934–38; 1946–47)

Mr. Maligie testified that even according to the most compact patterns possible for stacking bananas, the maximum capacity of Harbor's plant would be 60,620 boxes. (Tr. 5954, 6221–26) When bananas are stacked in the manner generally employed by Harbor, the maximum total capacity of the facility is decreased to 56,820 boxes. (Maligie, Tr. 6219–21)

It was stipulated that if Mr. Norman W. Eddles, an employee of United's customer service department and an expert on banana stacking and ripening procedures had testified, he would have said that the maximum practical capacity of Harbor's plant was 57,792 boxes of bananas. (Eddles, Tr. 4640–41)

The examiner found that the capacity of Harbor's plant was in the range cited by Mr. Maligie and Mr. Eddles. He gave no weight to what he characterized as "offhand estimates" by the jobber witnesses called by complaint counsel. The examiner found that Harbor's estimate of its plant's capacity would enable it to handle twice as many bananas as had been purchased by Harbor in 1964. He further found that the expanding population of the area in which Harbor was operating, construction of a plant this size was reasonable and was not evidence of monopolistic intent. He considered instead that Harbor's construction of a new plant with increased capacity was a "reasonable action to attempt to

[38] The record indicates that if Harbor had been able to process this amount, this would have been double the total number of boxes purchased by all southern California jobbers in 1964. (URX 55a, c)

stem the tide of self-ripening by chains that had gone on in other sections of the United States and that had commenced in Southern California." (I.D. ff. 98–99 [pp. 101–02 herein])

Our examination of the totality of the evidence reveals no basis for disturbing the hearing examiner's findings. Harbor's early press releases admittedly made what the evidence would indicate were grossly exaggerated statements with respect to the actual capacity of the plant. We find nothing in the record beyond these releases to contradict the actual plant capacity testified to by Harbor's manager and United's expert witnesses. The testimony regarding the capacity of Harbor's plant by the three jobbers produced by complaint counsel was sufficiently discredited on cross-examination as to be entitled no weight. (Tr. 2858–63; 3224–25; 4467–68) In light of the rapid growth projections of the Los Angeles area (the population was expected to double in ten years),[39] it was entirely reasonable for Harbor to build a plant to handle double the amount of bananas handled in 1964. We agree with the examiner that complaint counsel have failed to establish that the capacity of Harbor's plant was excessively large.

(c) *Harbor's Inducement of Direct Delivery*

Even though the examiner found that Harbor was relieved of liability under the Robinson-Patman Act for its inducement of United's discrimination, he analyzed this activity in terms of the attempt to monopolize charge. The examiner's review of the testimony and the contemporaneous exhibits led him to conclude that Harbor's concern with acquiring direct delivery of bananas at its Long Beach plant was clearly motivated by its concern to reduce its costs and increase its efficiency so that its business would not be destroyed by chains' self-ripening. He found that Harbor's action was taken to prevent the destruction of its business and was therefore not a step in or evidence of an intent to monopolize.

Our consideration of the facts underlying Harbor's inducement of United's discriminatory delivery service reveals no evidence of any specific intent on the part of Harbor to monopolize the distribution and sale of bananas in the Los Angeles-Orange

[39] This statement, relied upon by the examiner in his opinion, was found in in intraoffice memorandum of United Fruit. (CX 182b) There is no evidence that it was shown to Harbor. Furthermore, the statement was made without reference to its source. However, this prediction was consistent with the testimony of expert witnesses produced by respondents. *See e.g.*, Dr. Arthur, Tr. 5785–86. Additionally, total banana purchases in the southern California area did in fact increase by about 50 percent between 1964 and 1968. (URX 55)

county market. In our view the evidence establishes that throughout this 1962–1965 period Harbor was honestly concerned with the threat of an increase in the number of retail chains engaging in self-ripening and with the need to lower its own costs so as to discourage this trend and retain the business of these chains. We, therefore, agree with the examiner that the complaint charges that Harbor's inducement of United's discriminatory delivery constitute a part of its attempt to monopolize the market have not been made out.

### (d) *Harbor's Acquisition of the McCann Company*

In February 1968, following some two or three months of discussions and negotiations, Harbor acquired the assets of its next largest competitor, the McCann Company. The complaint alleged and the hearing examiner found that this acquisition violated Section 7 of the Clayton Act. The examiner's findings and conclusions on this count in the complaint will be discussed below.

This acquisition was also charged, however, as part of Harbor's alleged monopolization attempt and it is necessary, therefore, to consider the acquisition from this point of view.

The evidence indicates that it was McCann who took the initiative in the fall of 1967 in approaching Harbor to inquire whether Harbor had an interest in purchasing its business. (Maligie, Tr. 1991–93; Hooker, Tr. 6459) Specific discussions to explore this possibility were held in November, 1967. (Maligie, Tr. 1995, 1997–98) A draft purchase agreement was sent that same month by Harbor to McCann. (RHX 98 a–e; D'Antoni, Tr. 5255) Final agreement was reached in January 1968, and on February 2, 1968, the agreement of purchase was executed. Under the agreement Harbor paid $150,000 for the McCann assets which included McCann's leases in six market stalls, a warehouse located in the downtown market, seven trucks and personal property located in the buildings in which Harbor acquired the leasehold interest. (RHX 4) The agreement of purchase specifically provided that Mr. McCann, the sole stockholder of both corporations, was not precluded from engaging in any phase of the banana business in the future. (RHX 4e) The trade name, goodwill and accounts receivable were retained by Mr. McCann. (Maligie, Tr. 2200; 2202–3; 2199–2200; RHX 4f–j)

At the trial, Harbor's officials testified they acquired the

McCann assets principally because of their interest in McCann's selling stalls which were very well located, while Harbor's selling stalls were at the "dead end" of the market. (Maligie, Tr. 1726, 2014–15; D'Antoni, Tr. 5253) They were also interested in the lease on the McCann warehouse which offered a better location for storage of bananas than Harbor's downtown warehouse that was poorly located on a congested street. (D'Antoni, Tr. 5253)

The McCann Company was operating profitably at the time of its sale to Harbor. Although Mr. McCann testified at the hearing that the size of Harbor's plant was one of the factors influencing his decision to sell, (Tr. 3962–66) the record also discloses that at the time of the sale, Mr. McCann had indicated he was concerned about his own health and the liquidity of his assets if something were to happen to him. (Maligie, Tr. 1995–96; 4361–64; Hooker, Tr. 6461–62)

The examiner found that Harbor's acquisition of McCann was motivated by its desire to acquire warehouse space in the downtown Los Angeles market and was a part of Harbor's efforts to increase its efficiency and thereby enable it to better meet the competitive threat which it believed confronted it from the possibility of increased self-processing by the retail chains. He concluded that Harbor's acquisition was not separately illegal as a part of an attempt on the part of Harbor to monopolize the market. (I.D. pp. 54–55 [pp. 111–12 herein])

Complaint counsel were not able to produce any evidence at the hearing or argue any facts or legal authority on appeal which would contradict the examiner's findings or his reasons therefor. However, complaint counsel argue that no such evidence is necessary since the Commission's opinion in *Luria Brothers* made it clear that the requisite intent to monopolize can be inferred from the examiner's finding under Count IV that Harbor's acquisition of McCann was in violation of Section 7 of the Clayton Act.[40] (C. A. Br. p. 31)

We do not believe that our decision in the Luria case can be so read. In that case, Luria, a scrap metal supplier, was found to have engaged in a monopoly on the basis of a variety of factors in addition to its acquisition of one of its competitors, in violation of Section 7. In fact Luria had in addition to the acquisition, extracted arrangements to act as exclusive broker to supply

[40] *Luria Brothers and Co.*, 62 F.T.C. 243, at 603, (1963) *aff'd*, 389 F.2d 847 (3rd Cir. 1968), *cert. denied*, 393 U.S. 829 (1968).

scrap metal for more than twenty-five large basic steel producers covering hundreds of different mills; induced those mills to give it unlawful preferential treatment as a scrap broker; and extracted an exclusive arrangement in the United States for the export of scrap metal to foreign countries. We do not believe, therefore, that the requisite showing of intent in an attempt to monopolize charge can, without more, be inferred as a matter of law from a finding that the respondent has violated Section 7 of the Clayton Act.

We conclude, therefore, that the examiner was correct in rejecting complaint counsel's contentions and in finding that Harbor's acquisition of McCann was not separately illegal as part of Harbor's alleged attempt to monopolize the market in the Los Angeles-Orange county area.

In addition to their separate contentions with respect to each of these activities, complaint counsel make the further argument that the examiner erred in failing to consider the totality of the impact of these activities as evidencing Harbor's intent to monopolize the banana market in the Los Angeles area.

Our reading of the examiner's findings and conclusions makes it clear to us that the examiner carefully considered the alleged activities both independently and in their totality as indicia of Harbor's alleged monopolization attempt.[41] Thus considered, he found them consistent with Harbor's stated motivation of preserving their wholesale ripening business against the threat of self-ripening chains and concluded, therefore, that Harbor's activities were for a legitimate business purpose and could be explained as such. We cannot add anything more to his conclusion that, thus viewed, they do not constitute evidence that Harbor in taking those actions was attempting to monopolize the banana market.

Finally, complaint counsel also argue that even if no specific intent by Harbor to monopolize the market can be made out from these activities, such an intent must be inferred from the fact that Harbor acquired a monopoly of this market. Complaint counsel cite the examiner's finding that Harbor attained 64.9 percent of the relevant market (I.D. f. 120 [p. 106 herein]) and

[41] At page 55 of his initial decision, the examiner stated:

"Mindful of the doctrine of *Alcoa* we have also considered the impact of the total of all the acts charged, but we have reached no different conclusion. The acts, taken together, are consistent with the claimed motivation of preserving the ripening business of jobbers against the threat of withdrawal of the chain-store business through self-ripening and creating greater efficiency as a means to that end. Thus, Count III must be dismissed."

point out that this market share was four times larger than that of Harbor's nearest competitor and six times larger than that of its second largest competitor and that under the circumstances it must be regarded as conferring on Harbor a monopoly. Counsel argue that proof of Harbor's monopoly power can be seen in its power to set prices and from the fact while its efficiency decreased, its per box profits steadily increased. (C. A. Br., pp. 33–36) We disagree.

There is no dispute on the record that Harbor first lowered its prices in 1966 and then in mid–1968 increased its 1966 markup from 45 cents to 50 cents per box. However, one of Harbor's officials testified that Harbor could not enforce a price higher than that of its competitors, that the various jobbers (whom he named) would undercut Harbor, and that even a small-volume jobber has the full capacity of depressing the market. (Paul Jebbia, Tr. 4620–34) This testimony would seem to be borne out by the fact that on at least two occasions, in 1967 and again in 1969, Harbor attempted to raise its prices but was unable to do so because its competitors would not follow. (Maligie, Tr. 6103–04; 6314; Tr. 1968–79) Moreover, unless we are to find that whenever a company raises its prices, it must have monopoly powers, we do not believe that the evidence relied upon by complaint counsel, standing alone, can evidence the type of monopoly power contended for by counsel.

Nor do we believe that the evidence is sufficient to enable us to make any determination as to the accuracy of complaint counsel's contentions with respect to Harbor's costs and profits. Respondents attribute their increase in costs to inflation and their greater profits to their increased efficiency. In the absence of other proof, which complaint counsel have not produced, we do not believe that the mere showing of increased costs and increased profits is sufficient evidence on which to predicate a finding of a monopolistic power on the part of Harbor. It should also be pointed out in this connection that during this period, two new companies entered the banana jobber market.[42] While

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[42] A San Diego jobber, Coast Citrus, established banana ripening rooms in the Los Angeles market in January 1969. Furthermore, one of the old line Los Angeles jobbers retired after the acquisition and sold his business to a new comer. (Coniglio, Tr. 2654; Maligie, Tr. 2367) In addition to new entries into the banana wholesale market, there was evidence of continued growth of self-ripening chains, as one self-ripening chain, Arden-Mayfair, which had been a self-processor in San Diego, entered the Los Angeles market in 1969 (Maligie, Tr. 2387–88) and one of the other self-ripeners, Alpha Beta Acme, added four new ripening rooms to its facility in 1970. (Maligie, Tr. 2387–88)

it is true that the mere power to exclude is sufficient to make out a monopolization charge without demonstrating that the power has in fact been exercised, nevertheless the fact of these two entries may be taken as some indication that the market was not so dominated by Harbor as to discourage companies from entering.

We do not believe that the evidence is sufficient to enable us to conclude that Harbor had acquired a monopoly position in the Los Angeles market during the period in question and that, therefore, its intent to monopolize cannot be inferred from that fact. In sum, the record discloses no direct or overt evidence of monopolistic intent nor can such intent be inferred from any of Harbor's activities. We believe our analysis of the evidence before the Commission clearly demonstrates that the examiner's findings and conclusion on Count III were fully substantiated by the record. They will not be disturbed on appeal.

B. *Harbor's Activities as Unfair Acts of Competition*

Respondents vigorously object to complaint counsel's arguments that the four activities separately charged by the complaint as part of Harbor's attempt to monopolize were also charged as unfair acts of competition independent of their consideration as part of the central thrust of Count III which they interpret as being grounded primarily in an attempt to monopolize.

We read the complaint as charging Harbor with engaging in the enumerated activities as part of its alleged attempt to monopolize (Paragraph 14 [p. 59 herein]) and as additionally charging them as unfair acts of competition (Paragraph 15 [p. 59 herein])

We do not agree with the examiner that this is a "tortured" analysis nor with respondents that this interpretation of the complaint was not the basis on which the case was "tried." As we read the record, the parties offered voluminous evidence on the activities alleged to be illegal. The issue raised by the complaint and fully discussed in the briefs is whether they amounted to a violation of law. We see nothing in the complaint or in the arguments of counsel to cause us to limit our analysis of the lawfulness of these activities to only one facet of the charge in Paragraph 15 which alleged the basis under which these acts

were regarded as a violation of Section 5 of the Federal Trade Commission Act.

Accordingly, we believe it necessary to consider whether Harbor's activities constituted unfair acts of competition quite apart from their alleged role as part of Harbor's alleged attempt to monopolize the banana market.

Complaint counsel argue that Harbor's fixed price policy which the examiner agreed constituted sales below cost clearly evidenced predatory pricing on the part of Harbor, since Harbor admittedly did not adopt its pricing system to meet the price of a competitor, and since, they assert, Harbor did not have a legitimate business purpose for adopting its pricing policy. The issues thus raised by complaint counsel are whether the justification given by Harbor for its pricing policy was supported by the record, and, if so, whether this justification was sufficient to establish that this activity was not predatory.[43]

Complaint counsel challenge the credibility of Harbor's statements that it adopted the pricing policy to meet the potential threat to its business from the emergence of self-ripening chains. They rely in part for this argument on the fact that during the relevant period in issue here—1960 through 1968—very few retail chains engaged in self-ripening and became direct purchasers. Complaint counsel also argue that Harbor, in instituting this pricing policy, knew that the other jobbers would have to follow their price reductions, that its jobber competitors, like itself, would likely lose money at this price level and that they were in a less advantageous position than Harbor to sustain such losses. From this, counsel argue that Harbor's fixed price markup was not simply a defensive measure taken as part of its legitimate business interest to meet a competitive threat but rather evidenced an affirmative aggressive effort to injure its competitors and drive them from the market.

We do not believe the evidence bears out counsel's contentions in this respect. It is true, as complaint counsel assert, that only four out of 150 chains in the Los Angeles area engaged in self-ripening during the period from 1960 to 1966. (URX 55) Yet we

[43] Although predatory intent may be inferred from sales below cost, this inference does not arise when there is evidence that the below-cost level was reached defensively. *Ben Hur Coal Co.* v. *Wells*, 242 F.2d 481 (10th Cir. 1957), *cert. denied* 354 U.S. 910 (1957). *See also Golden Grain Macaroni Co.*, Docket No. 8737 (Jan. 18, 1971) [78 F.T.C. 63]; *Quaker Oats Co.*, 66 F.T.C. 1131 (1964), *E. B. Muller & Co.*, 33 F.T.C. 24, *aff'd* 142 F.2d 511 (6th Cir. 1944).

do not believe that this fact can be determinative of the issue. Certainly the logic of complaint counsel's argument would require companies concerned with competitive threats in the marketplace to sit back and wait until they become a reality before taking action. This is surely not the aim and purpose of our competitive marketplace nor the role of competition which this Commission was created to promote. Moreover, there is nothing in the record which raises any real question as to the sincerity of the expressed concerns by Harbor's officials or by their jobber competitors about the possibility of retail chains becoming self-processors and bypassing the jobbers. Safeway had in fact elected to follow this business practice. Ralph's clearly had commissioned a study to explore the economics of this step.

There is little doubt that Harbor's officials recognized that in instituting a lower price, it would be necessary to increase its volume to make up for the lower per box earnings. However, the evidence indicates that about one year after Harbor had instituted its 45-cent fixed price markup, it attempted to raise its prices but was unable to do so because Harbor's competitors would not follow it. (Maligie, Tr. 1968–79) It seems clear that if Harbor's 45-cent markup had caused its jobber competitors severe competitive injury, they would have followed this price increase with alacrity. Hence, complaint counsel's contentions that Harbor's markup was predatory would not seem to find support from this evidence.

The examiner, while not considering Harbor's pricing policy under Section 5, other than as part of an attempt to monopolize, did find a legitimate business reason for the policy and found that it was "a purely defensive measure to maintain the channel of jobber distribution." (I.D. p. 54 [p. 111 herein]) We believe the examiner was correct in this conclusion. Looking at Harbor's activities in this light we do not believe that they come within the ambit of predatory conduct for purposes of finding a violation of Section 5 as constituting an unfair act of competition.

Since the examiner found, and we agree, that the size of Harbor's plant was not excessively large, as contended by complaint counsel, predatory intent or unfair conduct can not be inferred from Harbor's plant capacity.

We have concluded that Harbor's inducement of United's direct belt delivery service as well as its acquisition of McCann, which we discuss below, constituted violations respectively of Section

2(f) of the Robinson-Patman Act and Section 7 of the Clayton Act. The relief deemed adequate to remedy these law violations is fully available without viewing these same activities as violations of Section 5. We see, therefore, no need to determine their separate legality or illegality under Section 5. We will dismiss this section of the complaint solely on our conclusion that any finding of illegality under that Section would be redundant and unnecessary on the basis of the particular facts and circumstances of the issues in this case.

C. *United as an Aider and Abettor*

Paragraph 16 of the complaint charges United with aiding and abetting Harbor's acts and practices alleged in Count III and Harbor's attempt to monopolize. The examiner concluded that no evidence existed to support this charge. The examiner stated:

> In the background of this industry in California, intent on the part of United was entirely implausible. United's officials were very clear that not only did they not intend to assist in creating a monopoly but that it would be contrary to United's interest to have Harbor become a monopoly. United's reluctance to meet fully all of the services Standard supplied to Harbor and United's demonstrated concern for the other jobbers (found in the contemporary documents) lends further support to our conclusion that United should not be held under Count III either. Hence, the case will be dismissed as to respondent United. (I.D. p. 51 [p. 109 herein])

We believe the examiner's finding should be affirmed. Not only did complaint counsel fail to establish that Harbor attempted to monopolize, they failed to produce any reason why United would have wanted Harbor to obtain a monopoly. Indeed, in this industry, involving a highly perishable product, it would have been illogical for the seller to want to establish one of its purchasers as a monopolist.

For all of the reasons noted above, we believe this count must be dismissed as against both respondents.

The Count IV Illegal Acquisition Allegation

Count IV of the complaint charges that Harbor's acquisition of the Charles C. McCann Company was in violation of Section 7 of the amended Clayton Act.

In February 1968, when this acquisition was consummated, Harbor had 40.5 percent of the banana market in the Los Angeles-

Orange county area measured in terms of the dollar volume of purchases from importers and 36.5 percent measured in terms of boxes purchased. McCann, its nearest competitor, had 24.4 percent and 27.4 percent respectively. (I.D. f. 117 [p. 106 herein]) The examiner found that as a result of the acquisition, Harbor would therefore have 64.9 percent of the market, measured in terms of dollar volume of purchase, and 63.9 percent, by boxes purchased. (I.D. f. 120 [p. 106 herein]) Moreover, he found that almost two-thirds of the potential power of banana jobbers was concentrated in Harbor and that the pre-existing concentration in the four largest jobbers, which had shared 86.1 percent of the relevant market, was reduced to three, with the two jobbers other than Harbor, *i.e.*, Pacific and Growers, providing less than 16 percent and 10 percent, respectively. (I.D. ff. 120–121 [pp. 106–07 herein]) Additionally the examiner found that one result of the acquisition was the complete destruction of the "intense competition that had previously existed between McCann and Harbor." (I.D. f. 120 [p. 106 herein]) The examiner also found that Harbor had, by reason of the acquisition, increased its potential capacity of about 58,000 boxes by 17,000 to 18,000 boxes and had secured an excellent outlet in the marketplace. (I.D. f. 122 [p. 107 herein])

For these reasons, the examiner concluded that the effect of Harbor's acquisition of the McCann assets might be to substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.

Respondent Harbor appeals the examiner's finding, contending that neither it or McCann was engaged in commerce, that the acquisition did not increase its market share and that at the time of the acquisition, McCann was a failing company.

The record is undisputed that both Harbor and McCann regularly purchased their bananas from United and Standard in commerce and sold bananas to customers both inside and outside the State of California. The examiner rejected Harbor's arguments that the physical transfers of bananas to Harbor and McCann and by them to their customers took place in Los Angeles. We agree with the examiner's findings and conclusions that the acquisition took place in commerce for purposes of Section 7. *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951) and *Shreveport Macaroni Mfg. Co., Inc.* v. *F.T.C.*, 321 F.2d 404 (5th

Cir. 1963), *cert. denied,* 375 U.S. 971 (1964); *see also Safeway Stores, Inc.* v. *F.T.C., supra.*[44]

We also agree with the examiner's rejection of Harbor's arguments that the acquisition did not increase its market share and was not demonstrated to be anticompetitive.[45] The relevant market in which to test the competitive effects of this merger, as we have previously discussed, is the Los Angeles-Orange county area and not the nine-county southern California area contended for by Harbor. The date selected by Harbor to test the competitive effects of this acquisition—six months after the acquisition took place—appears to us to be an entirely arbitrary period of time corresponding to a particular low level of Harbor's purchases which was not representative of Harbor's market shares in the terms of its total purchases either in the year preceding the acquisition or in the year following the acquisition.[46] Furthermore, as found by the examiner, the effect of this acquisition was to destroy competition between the two largest competitors in the market and to give the surviving entity a strong advantage over its competitors, not only in terms of market share, but also in terms of additional facilities and an improved location. We hold that the examiner's findings are supported by the record and clearly demonstrate the anticompetitive consequences of this acquisition.

Finally, we agree that the examiner properly rejected Harbor's arguments that McCann was a failing business at the time of the acquisition and that McCann had been unsuccessful in its previous attempts to sell the business. He found that the company was "by no means a failing business nor was it going to be discontinued as a business if the purchase negotiations fell through."

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[44] In *Safeway Stores,* an association of bakers in the State of Washington, was charged with price fixing under Section 5 of the FTC Act. The bakers claimed that the Alaskan sales, which were less than 1 percent of the total, were not in commerce and therefore not within the Commission's jurisdiction. The Court held, however, that the Alaskan sales were in interstate commerce and that since the prices to Alaskan customers were determined on the same basis as the prices for sales within Washington, the price fixing in the State of Washington necessarily affected the sales to Alaskan customers. Therefore sales to Alaskan customers were also within the jurisdiction of the FTC.

[45] Harbor relies on a chart prepared for this proceeding which indicates that six months after the acquisition Harbor had 37.03 percent of the market (consisting of all jobbers and self-ripening chains operating in the nine southern California counties); the other jobbers had 35.56 percent and the retail chains 27.41 percent. (RHX 220a)

[46] Harbor's share of the market in 1968, which included just one month of McCann participation, was 63.3 percent; Pacific and Growers shares were 15.8 percent and 9.6 percent respectively (URX 55 e–f) by dollar purchases. This demonstrates that Harbor retained by and large the market share acquired with the McCann assets (64.9 percent of dollar purchases or 63.3 percent of boxes purchased).

(I.D. f. 124 [p. 107 herein]) Furthermore, although Mr. McCann had a few years before the acquisition considered selling his business to his accountant or his manager and had at one time tried to interest Mr. Maligie, the Examiner found that there was "no proof that he made a concerted effort to sell." (I.D. f. 124 [p. 107 herein])

A review of the events leading to the sale, including the reasons given by Mr. McCann for selling, demonstrates that the examiner was correct in his findings. Mr. McCann's reasons for selling were his ill health and his concern about support for his wife after his death if his money were tied up in the assets of his business. (Maligie, Tr. 1995–96; Hooker, Tr. 6461–62) The evidence is clear that McCann was under no financial or economic necessity to sell—indeed it was making substantial banana purchases up to the date of sale—and that Harbor was by no means its only potential purchaser. (Maligie, Tr. 2009–11; McCann, Tr. 4408) In fact, one of the reasons Harbor purchased McCann's assets was Mr. Maligie's concern that a retail chain, Thrifti-Mart, was considering purchasing these assets. (Maligie, Tr. 2015–16)

Further, Harbor's principal argument on appeal is that the McCann business was not profitable at the time its assets were sold to Harbor, as the expression "profitable" is generally understood. Harbor concedes that McCann showed a profit of about $4,500 in 1967. (McCann, Tr. 4172) Nevertheless, it argues that Mr. McCann drew a very small salary, $3,075, during the entire year, (McCann, Tr. 3900; 4002) and that the McCann facilities were in poor repair and its operations highly inefficient. (Maligie, Tr. 2204–07; 6176; Hooker, Tr. 6463–67) The record does not bear out Harbor's assertions as to the inefficiency of McCann's operations and the poor condition of its facilities. Although McCann's business was not palletized, neither was Harbor's and the improvements made by Harbor were not made because the facilities were in "poor repair" but because Harbor palletized its entire operation, including the former McCann facilities. (Maligie, Tr. 2204–06; See also Tr. 5870–78; McCann, Tr. 4272–73) McCann was forced to curtail expenses, including his salary, in order to respond to Harbor's low fixed markup price policy. (McCann, Tr. 3884–3894; 3902, 3913–14) By the end of 1967, McCann was more competitive with Harbor and Mr. McCann paid himself a salary. (McCann, Tr. 4460–61)

Moreover, even assuming the correctness of all of Harbor's assertions about the condition in which the McCann Company was operating at the time of the acquisition, these do not add up to the type of failing condition in which a company must be in order to avoid the structure of Section 7's prohibitions.

In a recent opinion on the failing company doctrine in *Citizens Publishing Co.* v. *United States,* 394 U.S. 131, 136–38 (1969), the Supreme Court set out the requirements which it believed must be met by a company in order to bring itself within the failing company defense as follows:

1) the acquired company must be facing a grave possibility of business failure;

2) the acquiring company must be the only prospective purchaser; and

3) the prospects of the acquired company emerging as a competitive entity from reorganization must be "dim or non-existent."

The Court also said: "The burden of proving that the conditions of the failing company doctrine have been satisfied is on those who seek refuge under it." [394 U.S. at 138–39] *See also, Golden Grain Macaroni Company,* D. 8737 (January 18, 1971), mimeo opinion of the Commission, pp. 25–26 [78 F.T.C. 63, 174–5].

Harbor did not meet its burden with respect to *any* of these criteria. The first criterion, that the acquired company be facing a grave possibility of business failure, was not established. The McCann organization was competing with Harbor until the day of the acquisition. The management was capable and prepared to continue. Mr. McCann engaged in further business activity after the acquisition, and Mr. Hooker, who had managed the McCann facility, continued to work as an employee of Harbor. (Tr. 6428–30)

With respect to the second of the criteria, that the acquiring company must be the only prospective purchaser, not only has Harbor not met its burden, but testimony from Harbor's own chief operating official, Mr. Maligie, indicated that there would have been other prospective purchasers. Mr. Maligie testified that one of the reasons that Harbor desired to purchase McCann was to keep any other jobber or any chain from purchasing it. (Maligie, Tr. 2015–16)

The final criterion, that the prospects for effective reorganization would have to be dim or nonexistent, it is not applicable to the case at hand, since there was no evidence that such a

reorganization were even necessary, or if it had been, that it would have been ineffective.

We affirm the examiner's findings that Harbor's acquisition of the McCann assets might tend to lessen competition and that Harbor has not satisfied its burden of proving that McCann was a failing company for which no other purchaser could be found.

The Order

The examiner's proposed order concerned itself only with the Section 7 violation because of his conclusion that the other counts in the complaint failed of proof.

In view of our reversal of the examiner's conclusions with respect to the Section 2(a) and 2(f) violations, we are entering an order to remedy these violations as well as the Section 7 violation. Our order on the Robinson-Patman violations follows closely the original notice order attached to the complaint.

With respect to the McCann acquisition, the examiner proposed an order requiring Harbor within six months of service of the order to divest "all assets, properties, rights and privileges, tangible and intangible," acquired by Harbor as a result of its acquisition of the Charles C. McCann Company, and Tradewinds Produce, Inc., "together with the goodwill created by the use of such assets, and all additions and improvements thereto, of whatever description, so as to restore that which formerly made up the Charles C. McCann Company, and Tradewinds Produce, Inc., as a viable competitive entity in the business of processing, selling and distributing bananas."

The examiner's order also provides in Paragraph III that "respondent Harbor Banana Distributors, Inc., shall not acquire, directly or indirectly, through subsidiaries, joint ventures, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any concern engaged in the processing, sale, or distribution of bananas."

Harbor argues on appeal that the order is unduly broad in that it would require Harbor to restore as a viable competitor a business which would not have continued in any event and that it would require Harbor to divest goodwill and intangibles it maintains it did not acquire. Harbor also argues that the order is unnecessary in light of the competitive nature of this market.

We believe our discussion of the circumstances of this acqui-

sition and our reasons for concluding that it had the requisite likelihood of lessening competition disposes of the bulk of this argument. Moreover, Harbor's statements that it did not acquire the goodwill or any intangibles are contradicted by the record. In fact, Harbor acquired very important intangibles, namely McCann's leasehold interests in the downtown warehouse and other properties. Although goodwill was not included in the purchase agreement, it is clear from the record that Harbor acquired the great majority of McCann's former customers. Harbor also argues that the post-acquisition evidence demonstrates that the banana jobber market in Los Angeles is today "competitive, healthy and prosperous" and that anyone may easily enter the market. Harbor has offered no evidence for these statements. Moreover, we have already seen that Harbor's acquisition of McCann's assets had an adverse effect on competition in the Los Angeles banana jobber market. We are convinced that the divestiture order proposed by the examiner is essential in order to restore competition as nearly as possible to its position before the acquisition. His order is consistent with and appropriate for the facts in this case.

Finally, Harbor urges that Paragraph III of the examiner's recommended order, which requires Federal Trade Commission prior approval of any further acquisition of any concern engaged in the processing, sale, or distribution of bananas, should be limited to the relevant geographic market. Such a limitation on the order's requirement for advance approval cannot be supported on this record. Harbor has been and is still the largest jobber in the United States. Harbor has already demonstrated its ability to use its size to gain a discriminatory price advantage from the largest banana importer. In view of Harbor's size and power, it is essential that Harbor be required to come to the Commission for approval of acquisitions anywhere in the United States for a period of ten years.

For these reasons, the examiner's proposed order with respect to Harbor's divestiture of the McCann assets and the requirement of pre-acquisition notice will be affirmed.

Commissioner Dennison dissenting.

## FINAL ORDER

This matter having been heard by the Commission upon the appeals from the initial decision of respondents and complaint

counsel, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having concluded that on this record and the facts and circumstances set forth therein that the appeals should be granted in part and denied in part;

*It is ordered:*

(1) That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) That the following order be, and it hereby is, substituted for the order contained in the initial decision:

I.

*It is ordered,* That respondents United Brands, Inc., successor to United Fruit Company, and Chiquita Brands, Inc., successor to United Fruit Sales Corporation, corporations, and their officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of bananas in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Discriminating in the price of such products of like grade and quality by selling to any purchaser at a net price which directly, or indirectly by reason of differing terms and conditions of sale, is higher than the net price charged any other purchaser who competes in the resale of respondents' products with the purchaser, or with customers of the purchaser paying the higher price.

II.

*It is further ordered,* That respondent Harbor Banana Distributors, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the offering to purchase or purchase of bananas in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, from any seller a net price, which respondent

knows or should know is directly, or indirectly by reason of differing terms and conditions of sale, below the net price at which said products of like grade and quality are being sold by such seller to any other purchaser where respondent is competing with the purchaser, or a customer of the purchaser paying the higher net price.

III.

*It is further ordered,* That Count III of the complaint be dismissed.

IV.

*It is further ordered,* That:

1. Respondent Harbor Banana Distributors, Inc., a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors, and assigns, within six (6) months from the date of service upon it of this order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, and machinery acquired by Harbor Banana Distributors, Inc., as a result of its acquisition of the Charles C. McCann Company, and Tradewinds Produce, Inc., together with the goodwill created by the use of such assets, and all additions and improvements thereto, of whatever description, so as to restore that which formerly made up the Charles C. McCann Company, and Tradewinds Produce, Inc., as a viable competitive entity in the business of processing, selling and distributing bananas.

2. None of the assets, properties, rights or privileges, described in Paragraph IV, 1., of this order, shall be divested, directly or indirectly, to any person who is, at the time of the divestiture, an officer, director, employee, or agent, or under the control or direction of, respondent Harbor Banana Distributors, Inc., or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Harbor Banana Distributors, Inc.

3. Pending divestiture, respondent Harbor Banana Distributors, Inc., shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the companies to be divested that may impair their present capacity or market value, unless such capacity or value is restored prior to divestiture.

V.

*It is further ordered,* That respondent Harbor Banana Distributors, Inc., shall not, for a period of ten (10) years from the date of service of this order, acquire, directly or indirectly, through subsidiaries, joint ventures, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any concern engaged in the processing, sale, or distribution of bananas.

VI.

*It is further ordered,* That respondent Harbor Banana Distributors, Inc., shall forthwith distribute a copy of this order to each of its operating divisions.

VII.

*It is further ordered,* That respondents United Brands, Inc., and Chiquita Brands, Inc., shall forthwith distribute a copy of this order to each of their operating departments, divisions and subsidiaries engaged in the offering for sale, sale or distribution of bananas.

VIII.

*It is further ordered,* That respondents United Brands, Inc., Chiquita Brands, Inc., and Harbor Banana Distributors, Inc., shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in their corporate organization, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that may affect compliance obligations arising out of this order.

IX.

*It is further ordered,* That respondents United Brands, Inc., and Chiquita Brands, Inc., shall within sixty (60) days after service on them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

X.

*It is further ordered,* That Harbor Banana Distributors, Inc., shall within sixty (60) days after service on it of this order, and every sixty (60) days thereafter until it has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and/or has complied with this order. All compliance reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

Commissioner Dennison dissenting.

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IN THE MATTER OF

## COLONIAL CARPET MILLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

*Docket C-2342. Complaint, Jan. 16, 1973—Decision, Jan. 16, 1973.*

Consent order requiring a Union City, California, manufacturer and seller of carpets and rugs, among other things, to cease manufacturing for sale, selling, importing or distributing any fabric, material, or related product which fails to conform to an applicable standard of flammability or regulation issued under the provisions of the Flammable Fabrics Act, as amended.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of